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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 320

NEWTON W. ELLIS, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JULY 22, 1946.

CERTIORARI GRANTED NOVEMBER 25, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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[fol. 1-3] [Caption omitted]

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 374 No. 291

NEWTON W. ELLIS, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant

PETITION—Filed August 16, 1943

Comes now the plaintiff above named and for his cause of action against the above named defendant alleges:

I

That plaintiff is a citizen of the State of Washington.

II

That the defendant, Union Pacific Railroad Company, is and at all times herein alleged, was a corporation duly organized, created, chartered and existing under and by virtue of the laws of the State of Utah and as such engaging in the business of commerce in through and between the various states and territories of the United States the District of Columbia, and foreign countries, as a common [fol. 4] carrier by railroad and engaging in the business of interstate transportation by railroad as such common carrier.

III

That during all of said times said defendant was also engaging in the business of intrastate commerce and intrastate transportation as a common carrier by railroad within the State of Washington.

IV

That during all of said times, it was and is the statutory law of the State of Washington as follows:

"Section 6604-18 • • • Provided, however, that common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce, shall,

in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while employed by such carrier; • • • to the same extent and subject to the same limitations as the liability now existing, or hereafter created by the laws of the United States, governing recoveries by railroad employees injured while engaged in interstate commerce."

V

That during all of the times herein mentioned and in its business of interstate commerce, intrastate commerce, interstate transportation and intrastate transportation, defendant as such common carrier by railroad owned and operated a line and system of railroad through and between the City of Seattle in the State of Washington and the City of Omaha in the State of Nebraska, as well as between various points and places in said states and other states unnecessary to be herein specifically mentioned.

VI

That on March 15th, 1943, and for some time prior thereto this plaintiff was in the employ of said defendant as an engine foreman in switching and yard service in and about defendant's so-called Argo Yards in the City of Seattle, [fol. 5] State of Washington and that at the time he suffered the injuries and damages herein complained of he was engaging in the performance of work and duties of his employment and was then engaging in the performance of duties within the scope of his employment and in furtherance of defendant's business and at said time was employed by it either in its said business of interstate transportation or intrastate transportation by railroad.

VII

That on March 15th, 1943 at the hour of about 7:30 o'clock P. M. on defendant's said line and system of railroad and on its tracks at or in the vicinity of the Casein Company Plant on Marginal Way at Seattle in the State of Washington, plaintiff, while engaging in the course of performing work and duties of his employment in switching operations, was caused to be severely and permanently injured in consequence of the negligence and carelessness of said defendant as hereinafter more specifically alleged.

VIII

That in the switching operations in which plaintiff was then engaging the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place of work; that it negligently failed to provide and maintain adequate, sufficient and safe clearance between the track on which it was moving an engine and cars and a certain building or fixed structure near said track; that it negligently moved on said track a certain car which was too large to safely move on said track and that said car was out of repair and bulged to such extent as to greatly lessen the clearance between the bulging side of said car and said building or fixed structure; that it negligently and carelessly failed to maintain its said tracks in reasonably safe condition and permitted the same to be rough, uneven and unstable and permitted low joints to exist therein, all to such extent as to cause said car while in motion to list, sway, pitch and lurch [fol. 6] in the direction of said building or fixed structure, thereby greatly reducing the clearance between the side of said car and said building or fixed structure; that it negligently moved said car while the same was improperly and overloaded and while the same was otherwise in such negligent condition as to list and lean in the direction of said building or fixed structure, thereby causing and creating insufficient clearance between said car and said building; that it negligently and carelessly moved said car in the direction of and past said building or structure at a dangerous and excessive rate of speed and that it failed to exercise reasonable care for the safety of plaintiff, either by keeping a proper lookout or otherwise, and that it negligently and carelessly failed to warn plaintiff of the danger to which he was subjected while in a position he was necessarily occupying while engaging in such switching operations.

IX

That directly and proximately in consequence of the aforesaid negligent and carelessly acts and ommissions of said defendant this plaintiff was caused to be caught, crushed, rolled and dragged between said moving car and said building or fixed structure and to be knocked down and that as a result thereof he was caused to be severely and permanently bruised, contused, crushed, jarred and injured

in and about his entire body, both externally and internally, with severe injuries to the soft structures of his body, the fracturing of numerous bones therein, crushing and bruising injury to his head, neck, back and spine and chest and fracturing of the bones of both shoulders, concussion of the brain and severe shock and injury to his nervous system, and that in consequence of the injuries suffered by plaintiff [fol. 7] as a result of the aforesaid negligent and careless acts and omissions of said defendant, plaintiff has been made permanently sick, sore, lame and nervous in his entire body and caused to suffer great bodily and mental pain and anguish and complete general disability.

X

That at and immediately prior to the time of suffering said injuries plaintiff was a strong, healthy, able-bodied man aged 41 years and earning, and capable of earning in the work and services in which he was then engaging, in excess of the sum of Three Hundred Dollars ($300.00) per month; that ever since suffering said injuries plaintiff has been totally disabled and hereafter will be so disabled and has been and hereafter will be prevented from engaging in any gainful occupation, if not permanently at least for a long time to come and that in consequence thereof he has suffered and hereafter will suffer the loss of large sums of money by way of loss of earnings, time and impaired earning capacity.

XI

That directly in consequence of all of the injuries suffered and sustained by plaintiff as aforesaid he has been and hereafter will be compelled to incur and pay out a considerable sum of money in the necessary medical and surgical treatment of his injuries and by way of physician's and surgeon's services, medical and hospital expense, nurse's hire, medicines, massage and other medical care and treatment, the exact amount of which plaintiff is at this time unable to accurately estimate or ascertain but which he alleges upon information and belief, will exceed in reasonable value the sum of Five Thousand Dollars ($5,000.00).

XII

That by reason of the facts hereinbefore alleged, this [fol. 8] plaintiff has suffered and sustained general and

special damages at the hands of the defendant in the sum of Seventy-Five Thousand Dollars ($75,000.00).

Wherefore, plaintiff prays judgment against said defendant in the sum of Seventy-Five Thousand Dollars (75,000.00), together with the costs and disbursements of this action.

Newton W. Ellis, Plaintiff, by: Tautges, Rerat and Welch, 2155-60 Rand Tower, Menneapolis, Minnesota; and Rosewater, Mecham, Shackelford and Stoehr, 1028-40 City National Bank Bldg., Omaha, Nebraska, Attorneys for Plaintiff.

Duly sworn to by William A. Tautges and George N. Mecham. Jurats omitted in printing.

[fol. 9] [File endorsement omitted.]

[fol. 10] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

ANSWER—Filed February 18, 1944

Comes now the defendant above named and for answer to plaintiff's petition filed herein admits, denies and alleges as follows:

I

Defendant admits the allegations contained in paragraphs I, III, IV and V of said petition and admits the allegations contained in paragraph II thereof, except that defendant specifically denies that it is engaged in the business of commerce as a common carrier by railroad in the territories of the United States, the District of Columbia, or foreign countries.

II

Defendant further admits that on or about March 15, 1943, the plaintiff while engaged in the course of the performance of his work and duties as an engine foreman in switching and yard service in and about defendant's Argo Yards in the City of Seattle, Washington, was injured, but defendant specifically denies that said injuries were of the nature, extent or degree alleged in plaintiff's petition.

III

Defendant denies each and every allegation in said petition contained, except such as have been expressly admitted to be true.

IV

For further answer defendant alleges that any injuries [fol. 11] sustained by plaintiff and all damage occasioned to plaintiff thereby resulted from the carelessness, recklessness and negligence of the plaintiff, which negligence upon plaintiff's part was the sole proximate cause of injury which plaintiff sustained.

Wherefore, defendant prays that plaintiff's petition be dismissed and that defendant recover its costs herein incurred.

Union Pacific Railroad Company, a corporation, by T. F. Hamer, G. C. Holdrege, R. B. Hamer, Its Attorneys.

Duly sworn to by R. B. Hamer. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 12] In the District Court of Douglas County, Nebraska

[Title omitted]

Reply—Filed February 29, 1944

Comes now the plaintiff above named and for reply to the answer of the above named defendant herein alleges:

I

That he denies the allegations of paragraph IV of said answer.

II

That he denies that he was guilty of any negligence which either in whole or in part contributed to the injuries sustained by him, as alleged in his petition herein.

Wherefore, plaintiff prays for judgment as demanded in his petition.

Newton W. Ellis, by Tautges, Rerat & Welch and by Rosewater, Mecham, Shackelford & Stoehr, His Attorneys.

Duly sworn to by George N. Mecham. Jurat omitted in printing.

[fol. 13] Due and personal service of the within Reply is hereby admitted this ..... day of ....., 1944. .... Attorneys for Defendant. Tauges, Rerat & Welch and Rosewater, Mecham, Shackelford & Stoehr Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 14] In District Court of Douglas County

[Title omitted]

Order Admitting Attorney to Practice in this Case Only —May 8, 1944

Upon motion and showing duly made, it is ordered that William A. Tautges of the firm of Tautges, Rerat and Welch of Minneapolis, Minnesota, a regularly admitted practicing attorney in the Courts of record of the state of Minnesota, be, and hereby is, admitted to practice in the State of Nebraska for the purpose only of assisting in the trial of this case.

In District Court of Douglas County

[Title omitted]

Order Impanelling Jury—May 8, 1944

Now, on this day, this cause comes on for trial, the parties hereto appearing by their respective counsel. Thereupon comes the following named persons as jurors, to-wit:

Louis S. Schab, Lawrence C. Pendleton, Frank Jershin, William Placek, Leonard M. Jaworski, Demos George Ja-

mopulos, Charles E. Jackson, John Lamprecht, James C. Harris, Jr., Oscar L. Schlutter, Leo S. Mead, Baylous Jackson who were impaneled and sworn according to law, and the trial proceeds.

[fol. 15] The said jury having heard the opening statements and the evidence adduced in part, further hearing of this cause is continued to Tuesday morning, May 9, 1944, at 9:30 o'clock.

IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

TRIAL ORDERS—May 9, 1944

Now, on this day, again came the parties hereto by their respective counsel. Also came the jury heretofore impaneled and sworn, and the trial proceeds.

The said jury having heard further evidence adduced on behalf of the plaintiff, further hearing of this cause is continued to Wednesday morning, May 10, 1944, at 9:30 o'clock.

[Title omitted]

[fol. 16] May 10, 1944

Now, on this day, again came the parties hereto by their respective counsel. Also came the jury heretofore impaneled and sworn, and the trial proceeds.

The said jury having heard further evidence adduced on behalf of the plaintiff, further hearing of this cause is continued on Thursday morning, May 11, 1944, at 9:30 o'clock.

[Title omitted]

May 11, 1944

Now, on this day, again came the parties hereto by their respective counsel. Also came the jury heretofore impaneled and sworn, and the trial proceeds.

The said jury having heard the remaining evidence adduced on behalf of plaintiff, and plaintiff resting, motion of defendant is presented, submitted and overruled. Defendant excepts.

The said jury having heard further evidence adduced, further hearing of this cause is continued to Friady morning, May 12, 1944, at 9:30 o'clock.

[fol. 17] [Title omitted]

May 12, 1944

Now, on this day, again came the parties hereto by their respective counsel. Also came the jury heretofore impaneled and sworn, and the trial proceeds.

The said jury having heard further evidence adduced and defendant and plaintiff resting, further hearing of this cause is continued to Monday morning, May 15, 1944, at 9:30 o'clock.

Afterward, on the 15th day of May, 1944, Instructions Given by the Court were filed herein, and are in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

INSTRUCTIONS GIVEN BY THE COURT—May 15, 1944

Gentlemen of the Jury, you are instructed as follows:

No. 1

Newton W. Ellis is plaintiff in this action and Union Pacific Railroad Company, a corporation, is defendant.

Plaintiff in his petition alleges that he was working as a [fol. 18] switchman for the defendant company on March 15, 1943, in what is known as the Argo Yards in the City of Seattle, in the State of Washington, and alleges that he was working in the capacity of engine foreman.

He alleges that at about 7: o'clock, P. M., on March 15, 1943, while engaged in performing the work and duties of his employment as engine foreman in a switching crew, he was squeezed between the side of one of the defendant's box cars and a building along the side of the spur switch track of the defendant, on which the switching crew of which plaintiff was engine foreman was moving the said box car.

Plaintiff alleges that the said squeezing caused him severe and permanent injuries and alleges that said injuries

were caused by negligence and carelessness of the defendant company. He alleges that defendant failed to provide plaintiff with a reasonably safe place to work and alleges that it failed to provide adequate and sufficient safe clearance on the track on which it was moving an engine and cars, and the building structure near the said track.

Plaintiff alleges that the defendant was guilty of negligence in moving the car which came in contact with plaintiff, in that the said car was too large to safely move on the said track. He further alleges that the defendant negligently and carelessly failed to maintain its said tracks in a reasonably safe condition and permitted the same to become uneven, and permitted low joints to exist therein, which plaintiff alleges caused the car while in motion to list in the direction of the building, and alleges that that greatly reduced the clearance between the side of the car and the said building. He further alleges that defendant carelessly failed to warn plaintiff of the danger to which [fol. 19] he was subjected while engaged in the switching operations, and alleges that he was necessarily, in the performance of his duties, in the position in which he was at the time of his injury.

Plaintiff alleges that he was caught, crushed and rolled between the said moving car and the building, and as a result thereof he was severely and permanently bruised and crushed in and about his entire body. He alleges that as a result thereof he suffered fractures of numerous bones and a crushing and bruising injury to his neck, back, spine and chest; fractur of the bones of the shoulder, and further alleges that he suffered concussion of the brain and severe shock to his nervous system.

He alleges that all of these injuries were the result of negligent and careless acts of omission on the part of the defendant, and that said injuries have caused him to become permanently sick, sore, lame and nervous in his entire body, and have caused him to suffer great mental pain and anguish and complete general disability. He alleges that at the time he suffered the said injuries he was a strong, healthy, able bodied man of the age of 41 years, and earning and capable of earning in excess of $300.00 per month. He alleges that ever since said injuries he has been totally disabled and that he hereafter will be so disabled and prevented from engaging in any gainful occupation, if not permanently, at least for a long time to come. He alleges that

as a result thereof he has suffered and will continue to suffer the loss of large sums of money as earnings, in the past and in the future. He alleges that as the result of said injuries he has been compelled to incur and pay out a considerable sum of money for medical and surgical treatment and for hospital services, including nurses, medicines, mas-
[fol. 20] sage and other medical care and treatment, the exact amount of which he is unable to state, but he alleges that it will exceed $5,000.00, and plaintiff prays judgment for his damages so sustained.

Given.

Fitzgerald, Judge.

No. 2

Defendant for answer admits the allegations in plaintiff's petition in regard to defendant's conducting and carrying on the business of a railroad company in the vicinity where the accident set out in plaintiff's petition occurred, and admits that the plaintiff was in the employ of the defendant at the time and place alleged in the plaintiff's petition, in the Argo Yards in the City of Seattle, Washington, but defendant denies that the injuries suffered by plaintiff were of the nature and extent alleged in plaintiff's petition, and denies all other allegations of the plaintiff's petition.

Defendant alleges that any injuries sustained by the plaintiff, and the damage occasioned thereby, resulted from carelessness and negligence on the part of the plaintiff, and alleges that such negligence on the part of the plaintiff was the sole and proximate cause of the injuries which he suffered, and defendant prays that the case may be dismissed.

Given.

Fitzgerald, Judge.

No. 3

The plaintiff for reply denies the allegations of negligence on the part of plaintiff, as contained in defendant's answer.

Given.

Fitzgerald, Judge.

[fol. 21] No. 4

This action is based on negligence, and the mere fact that there was an accident, and that plaintiff was injured, does not give him the right to recover against the defendant, but

before plaintiff is entitled to a verdict he must prove by a preponderance of the evidence that the accident and injuries to him were proximately caused by negligence of the defendant or its employees. He must further prove the nature and extent of his injuries and that the injuries were proximately caused by the accident alleged in the petition.

If you find from a preponderance of the evidence that plaintiff has proved that the accident and injuries to plaintiff were proximately caused by negligence of the defendant or its employees, then your verdict will be in favor of the plaintiff in whatever sum you may find he has been damaged as the direct and proximate result of his injuries so incurred, unless you find that plaintiff himself was guilty of negligence contributing to cause the accident, in which case your attention is directed to Instruction Number 9.

If you find from a preponderance of the evidence that plaintiff has failed to prove that the accident and injuries to plaintiff were proximately caused by negligence of the defendant or its employees, then your verdict will be in favor of the defendant.

Given.

Fitzgerald, Judge.

No. 5

By a preponderance of the evidence is meant, not necessarily the greater number of witnesses, but a preponderance means that amount of the evidence which, on the whole, produces the stronger impression upon you, and convinces you of its truth when weighed against the evidence in opposition thereto.

Given.

Fitzgerald, Judge.

[fol. 22] No. 6

By "negligence" is meant the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.

By "contributory negligence" is meant any negligence of the plaintiff directly contributing to the accident.

By "ordinary care" is meant that amount or degree of care which ordinary prudence and a proper regard for one's safety and the safety of others would require under the circumstances shown in the evidence.

By the term "proximate cause" is meant the primary or moving cause or fault where no other and independent cause disconnected therewith and self-operating, intervenes to produce the result.

Given.

Fitzgerald, Judge.

No. 7

This action is based on the Federal Employers' Liability Act, which provides in substance that every common carrier by railroad, while engaged in commerce and the transportation of greight, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or any injury resulting whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its appliances, tracks or roadbed. The Act further provides that in all actions brought against any such common carrier by railroad to [fol. 23] recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to such employee, which section of the law is more directly covered by Instruction Number 9.

Given.

Judge.

No. 8

The defendant in its answer alleges that the accident was caused by negligence of the plaintiff, and that negligence of the plaintiff was the sole and proximate cause of the accident and the injuries to plaintiff.

This allegation comes within the provisions of the contributory negligence rule, which provides that when the defendant alleges negligence on the part of the plaintiff, known as contributory negligence, the burden is upon the defendant to prove the contributory negligence of the Plaintiff by a preponderance of the evidence, but evidence of negligence on the part of the plaintiff need not come solely from the witnesses on behalf of the defendant, but may be gathered by you from all of the testimony received in the trial.

If you find that defendant has proved that the plaintiff was guilty of negligence directly contributing to the cause of the accident in which plaintiff was injured, then your attention is directed to Instruction No. 9, but if you find a fair preponderance of all of the evidence that negligence of the plaintiff was the sole and proximate cause of the accident, then your verdict will be in favor of the defendant, and against the plaintiff.

Given.

Fitzgerald, Judge.

[fol. 24]

No. 9

If you find from the evidence that both parties were guilty of negligence contributing to cause the collision, then it will be your duty to compare the negligence of the parties. After you have found the total amount of plaintiff's damages, you are required to reduce the amount of your verdict in such amount as in your judgment the facts disclosed by the testimony justify. For instance, if you find that the negligence of the plaintiff was equal to the negligence of the defendant, then your verdict should be for one-half the amount which you have found was the total amount of plaintiff's damage. You are warned not to take this as a suggestion that fifty-fifty is a proper proportion, but is given to you only as an illustration of the method to be used by you in comparing the negligence of plaintiff and defendant.

Given.

Fitzgerald, Judge.

No. 10

You are instructed that the doctrine of assumption of risk has no place in this case, and that under the Federal Employers' Liability Act, the plaintiff cannot be held to have assumed the risk of his employment. This instruction, however, is not intended to conflict with the instructions on the subject of negligence.

Given.

Fitzgerald, Judge.

No. 11

You are instructed that it was the duty of the defendant to exercise ordinary and reasonable care to provide and maintain for plaintiff a reasonably safe place to work, and if you find from a preponderance of the evidence that de-

[fol. 25] fendant failed to fulfill that duty, such failure or

omission on its part would constitute actionable negligence, and if you find from a preponderance of all the evidence that such negligence proximately caused the injuries to plaintiff, then it would become your duty to find a verdict in favor of the plaintiff.

Given.

Fitzgerald, Judge.

No. 12

If you find a fair preponderance of all of the evidence that defendant's engineer who was operating the locomotive shoving the car in on the Casein spur track, knew or in the exercise of ordinary care should have known and discovered that plaintiff was in a position of peril, and that the engineer in the exercise of ordinary care could and should have avoided injuring plaintiff, and you find from a preponderance of the evidence that the engineer negligently failed to do so, then it would become your duty to find a verdict in favor of the plaintiff.

Given.

Fitzgerald, Judge.

No. 13

If you find a fair preponderance of the evidence that defendant was negligent, and that such negligence proximately caused injury and damage to plaintiff, then it will be your duty to determine the amount of such damage as you may find from a preponderance of the evidence that plaintiff suffered directly and proximately in consequence of said injuries.

In determining the amount of such injuries it becomes your duty to determine the nature, character and extent of the personal injuries suffered by plaintiff; the pain, suffering, discomfort, distress and inconvenience which re- [fol. 26] sulted to the plaintiff in consequence of such injuries; the extent to which he has been prevented in consequence of such injuries from engaging in gainful occupation from the time he was injured up to the present time, and it is also your duty to determine from the evidence, by a fair preponderance thereof, the amount of loss of wages of earnings which he will suffer in the future as a direct and proximate result of said injuries. It is also your duty to take into consideration in assessing damages, such further pain as he will suffer in consequence of the personal injuries sustained by him, bearing in mind, how-

ever, that you can allow damages for such injuries only as are the proximate result of defendant's negligence, and in measuring damages which you may find plaintiff will suffer in the future, you are instructed to allow only such damages as you may find, by a fair preponderance of the evidence, are reasonably certain to result from the injuries sustained by plaintiff.

You will also take into consideration any expenses to which the plaintiff has been put for medical, hospital or surgical services rendered to him, as the direct and proximate result of the injuries sustained by him as a result of the negligence of defendant or its employees.

You will add all of those items together and return your verdict in such amount as in your judgment will fairly compensate plaintiff for all of such damages, unless you find that plaintiff was himself guilty of negligence directly contributing to the proximate cause of the accident, in which case your attention is directed to Instruction Number 9.

If you find in favor of the defendant, you will simply so state by your verdict.

Given.

Fitzgerald, Judge.

[fol. 27] No. 14

It is your duty to scrutinize carefully and to weigh dispassionately, the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive.

Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering, their interest, bias or prejudice, if any, and their means of knowing the matters concerning which they testify.

You are the sole judges of the credibility of the witnesses, and of the weight to be given their evidence. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet, you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it unreconcilable with other testimony which you find to be true.

Given.

Fitzgerald, Judge.

No. 15

When you retire to your room for deliberation, you will select one of your number as foreman, who must sign the verdict you agree upon, but if, after deliberating six hours you do not arrive at a unanimous verdict, but ten of your number do agree upon a verdict, such verdict may be returned, but the ten members agreeing thereto must sign the same.

If you do not agree upon a verdict by nine o'clock you may separate for the night and return for deliberation at nine o'clock tomorrow morning, but in such event, you are warned not to discuss the case with any person or with each other until you reconvene.

[fol. 28] If you agree upon a verdict when court is not in session, sign the same as herein instructed and place it in a sealed envelope in the custody of your foreman and you will all be in court at the opening of its next session to return your verdict.

Forms of verdict will be handed you with these instructions for your use.

By the Court: Jas. M. Fitzgerald, Judge.

Given.

_____

Fitzgerald, Judge.

IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

ORDER, VERDICT AND JUDGMENT—May 15, 1944

Now, on this day, again came the parties hereto by their respective counsel. Also came the jury heretofore impaneled and sworn and the trial proceeds.

The said jury having heard arguments of respective counsel and the instructions of the Court thereupon retired at [fol. 29] 12:25 o'clock P. M. in charge of a sworn officer for deliberation. Afterwards, at 3:45 o'clock P. M., the said jury returned into open court with their verdict in writing, which said verdict reads and is in the words and figures following, to-wit:

[Title omitted]

We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff, and fix the amount

of his recovery against the defendant in the sum of $10,000.00.

Leo S. Mead, Foreman, James C. Harris, Jr., Frank Jershin, William Placek, Demos Geo. Jamopulos, Chas. E. Jackson, Leonard M. Jaworski, L. C. Pendleton, Oscar L. Schlutter, John Lamprecht, Baylous Jackson, X His Mark per Leo S. Mead, Leo S. Mead, Louis S. Schab.

Thereupon the said jury was discharged from further consideration of this cause.

Whereupon, the above verdict having been received and entered, it is considered, ordered and adjudged by the Court that said plaintiff, Newron W. Ellis, have and recover of and from the defendant, Union Pacific Railroad Company, a corporation, the sum of ten thousand dollars ($10,000.00) together with interest thereon from date hereof at the rate of 6% per annum and his costs herein expended, taxed at $.....

[fol. 30] In the District Court of Douglas County, Nebraska

[Title omitted]

Motion for New Trial—Filed May 17, 1944

Comes now the defendant and respectfully moves the Court to vacate and set aside the verdict of the jury returned in the above entitled cause and to vacate and set aside the judgment entered thereon, and to grant unto defendant a new trial upon each of the following grounds or causes, each of which affected materially the substantial rights of the defendant:

1. Irregularity in the proceedings of the Court by which defendant was prevented from having a fair trial.
2. Irregularity in the proceedings of the jury by which defendant was prevented from having a fair trial.
3. Irregularity in the proceedings by the plaintiff by which defendant was prevented from having a fair trial.
4. Misconduct of the jury.
5. Misconduct of the plaintiff.
6. Misconduct of the attorneys for plaintiff.

7. The amount of the verdict and damages given are excessive and appear to have been given under the influence of passion or prejudice.

8. Errors of law occurring at the trial and excepted to by defendant.

[fol. 31] 9. The verdict is contrary to the evidence.

10. The verdict is not sustained by sufficient evidence.

11. The verdict is contrary to law.

12. The Court erred in overruling the motion made by defendant at the conclusion of plaintiff's evidence to dismiss plaintiff's petition and enter judgment in favor of the defendant or, in the alternative, to instruct the jury to return a verdict in favor of the defendant.

13. The Court erred in overruling the motion made by defendant at the conclusion of all the evidence to dismiss plaintiff's petition and enter judgment in favor of the defendant or, in the alternative, to instruct the jury to return a verdict in favor of the defendant.

14. The Court erred in giving to the jury Instruction No. 1.

15. The Court erred in giving to the jury Instruction No. 2.

16. The Court erred in giving to the jury Instruction No. 3.

17. The Court erred in giving to the jury Instruction No. 4.

18. The Court erred in giving to the jury Instruction No. 5.

19. The Court erred in giving to the jury Instruction No. 6.

20. The Court erred in giving to the jury Instruction No. 7.

21. The Court erred in failing to show upon the margin of Instruction No. 7 that said instruction was given to the jury by failing to write the word "given" upon the margin of said instruction.

[fol. 32] 22. The Court erred in giving to the jury Instruction No. 8.

23. The Court erred in giving to the jury Instruction No. 9.

24. The Court erred in giving to the jury Instruction No. 10.

25. The Court erred in giving to the jury Instruction No. 11.

26. The Court erred in giving to the jury Instruction No. 12.

27. The Court erred in giving to the jury Instruction No. 13.

28. The Court erred in giving to the jury Instruction No. 14.

29. The Court erred in giving to the jury Instruction No. 15.

Union Pacific Railroad Company, a corporation, Defendant, by T. F. Hamer, G. C. Holdrege, R. B. Hamer, Its Attorneys.

[File endorsement omitted.]

[fol. 33] In District Court of Douglas County

[Title omitted]

Order Submitting Motion for New Trial—July 10, 1944

Now, on this day, this cause comes on for hearing upon motion of defendant for an order of the Court setting aside the verdict of the jury, vacating the judgment entered thereon and for a new trial; and, arguments of counsel having been heard thereon said motion is submitted to the Court and is by the Court taken under advisement.

In District Court of Douglas County

[Title omitted]

Order Overruling Motion for New Trial—July 28, 1944

Now, on this day, this cause comes on for hearing upon the motion of defendant for a new trial; upon consideration whereof, being fully advised in the premises,

It is ordered by the Court that said motion be, and the same hereby is, overruled, to which the defendant excepts and is allowed forty days from the rising of the Court in which to prepare and serve a bill of exceptions.

[fol. 34] IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

ORDER FIXING SUPERSEDEAS—August 7, 1944

Now on this 7th day of August, 1944, this matter came on for hearing upon the application of the defendant for an order fixing the amount of the supersedeas bond to be filed by said defendant herein.

On consideration whereof, the Court finds, and hereby orders, that the amount of the supersedeas bond to be filed by defendant herein to supersede the judgment entered herein, pending appeal to the Supreme Court of Nebraska, be, and is hereby fixed, in the sum of Twelve Thousand Dollars ($12,000.00).

By the Court, Jas. M. Fitzgerald, Judge.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

NOTICE OF APPEAL—Filed August 10, 1944

[fol. 35-36] To Newton W. Ellis, and Tautges, Rerat & Welch, and Rosewater, Mecham, Shackelford & Stoehr, his Attorneys.

You, and each of you, are hereby notified that the Union Pacific Railroad Company, defendant in the above entitled cause, intends to appeal from the judgment entered herein on the 15th day of May, 1944, and from the order overruling said defendant's motion for a new trial, entered herein on July 28, 1944, unto the Supreme Court of Nebraska.

Union Pacific Railroad Company, Defendant and Appellant, by T. F. Hamer, G. C. Holdrege, R. B. Hamer, Its Attorneys.

[File endorsement omitted.]

Supersedeas Bond on Appeal for $12,000 approved and filed August 10, 1944 omitted in printing.

[fol. 37] In District Court of Douglas County

[Title omitted]

Order Continuing all Cases until Following Term—September 30, 1944

It is hereby ordered that all cases, motions, and matters now pending in this Court, and not otherwise disposed of be, and the same are hereby continued until the next Term thereof.

This present Term of said District Court was begun on the 1st day of May A. D. 1944, and continued from day to day and from time to time by regular adjournments until this 30th day of September A. D. 1944 at 12:00 o'clock M. and is hereby adjourned sine die.

Henry J. Beal, Presiding Judge, Charles Leslie, Jas. M. Fitzgerald, Willis G. Sears, Arthur C. Thomsen, W. A. Day, Frank M. Dineen, Herbert Rhoades, Judges.

[fol. 38-39] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 40] In the District Court of Douglas County, Nebraska

Doc. 374 No. 201

Newton W. Ellis, Plaintiff,

vs.

Union Pacific Railroad Company, a corporation, Defendant.

Defendant's Bill of Exceptions—Filed November 29, 1944

Consisting of Volumes I and II, and Plaintiff's Exhibit Number 1 and Plaintiff's Exhibits A, B, C, D, E, F and G, attached separately:

At the regular May, A. D. 1944, Term of Court, Before the Hon. Jas. M. Fitzgerald, Judge, and a Jury, at Omaha, Nebraska, May 8-15, 1944.

APPEARANCES:

For Plaintiff: Mr. W. A. Tautges, of Tautges, Rerat & Welch, Minneapolis, Minnesota, and Mr. George Mecham, of Rosewater, Mecham, Shackelford & Stoehr, Omaha, Nebraska.

For Defendant: Mr. T. F. Hamer and Mr. Robert B. Hamer, Omaha, Nebraska.

[fol. 41] PLAINTIFF'S RECEIPT FOR DEFENDANT'S BILL OF EXCEPTIONS AND PROPOSAL FOR AMENDMENTS

Received of the attorneys for the Defendant, for examination and amendment, a draft of a Bill of Exceptions, consisting of Volumes I and II, and Plaintiff's Exhibit Number 1, and Plaintiff's Exhibits A, B, C, D, E, F, and G, attached separately, in the case of Newton W. Ellis, Plaintiff, versus Union Pacific Railroad Company, a corporation, Defendant, Doc. 374, No. 291, tried in the District Court of the Fourth Judicial District of Nebraska, within Douglas County, Nebraska, at the regular May, A. D. 1944, term of Court.

Dated, October 23, 1944.

Tautges, Rerat & Welch and Rosewater, Mecham Shackelford & Stoehr, Attorneys for Plaintiff.

We herewith return the draft of the Bill of Exceptions in the above entitled cause, submitted to us on the date above written, and propose the following amendments:

Dated, November 28, 1944.

Tautges, Rerat & Welch and Rosewater Mecham Shackelford & Stoehr, Attorneys for Plaintiff.

[fol. 42] It is hereby stipulated and agreed by and between the parties hereto, plaintiff and defendant, that the within and following, consisting of Volumes I and II, and Plaintiff's Exhibit Number 1, and Plaintiff's Exhibits A, B, C, D, E, F, and G attached separately, is a true and complete transcript of all of the evidence offered, received and rejected, oral and documentary, upon the trial of this cause, together with all offers, objections, motions, rulings

of the Court thereon, and all exceptions to such rulings made and taken at said trial.

Dated, November 28, 1944.

Tautges, Rerat & Welch and Rosewater Mecham Shackelford & Stoehr, Attorneys for Plaintiff, T. F. Hamer, G. C. Holdrege, R. B. Hamer, Attorneys for Defendant.

[fols. 43-44] JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

I certify That the within and following Bill of Exceptions, consisting of Volumes I and II, and Plaintiff's Exhibit Number 1, attached separately, and Plaintiff's Exhibits A, B, C, D, E, F, and G attached separately, contains all of the evidence offered, and all of the evidence given, both oral and documentary, upon the trial of this cause, together with all oral motions, stipulations, offers, objections, rulings of the Court thereon, and exceptions to such rulings, made upon said trial; that the said trial was had at the time and place stated herein; and, upon application of the defendant herein this Bill of Exceptions is allowed by me and ordered to be made a part of the record in this case.

Jas. M. Fitzgerald, Judge.

Dated at Omaha, Nebraska, this 28 day of November, 1944.

Clerk's Certificate to Bill of Exceptions omitted in printing.

[fol. 45] Reporter's Certificate to Bill of Exceptions omitted in printing.

[fol. 46] Be it remembered, That in the District Court of the Fourth Judicial District of Nebraska, within and for the County of Douglas, at the regular May, A. D. 1944 term of said Court, holden at Omaha, in said County and State, before Honorable Jas. M. Fitzgerald, Judge, and a jury impaneled and sworn, to-wit; on the 8th to the 15th days of May, 1944, the case of Newton W. Ellis, Plaintiff, versus Union Pacific Railroad Company, a corporation, Defendant, Doc. 374, No. 291, came on for trial to the Court and Jury, and the following proceedings were had, viz:

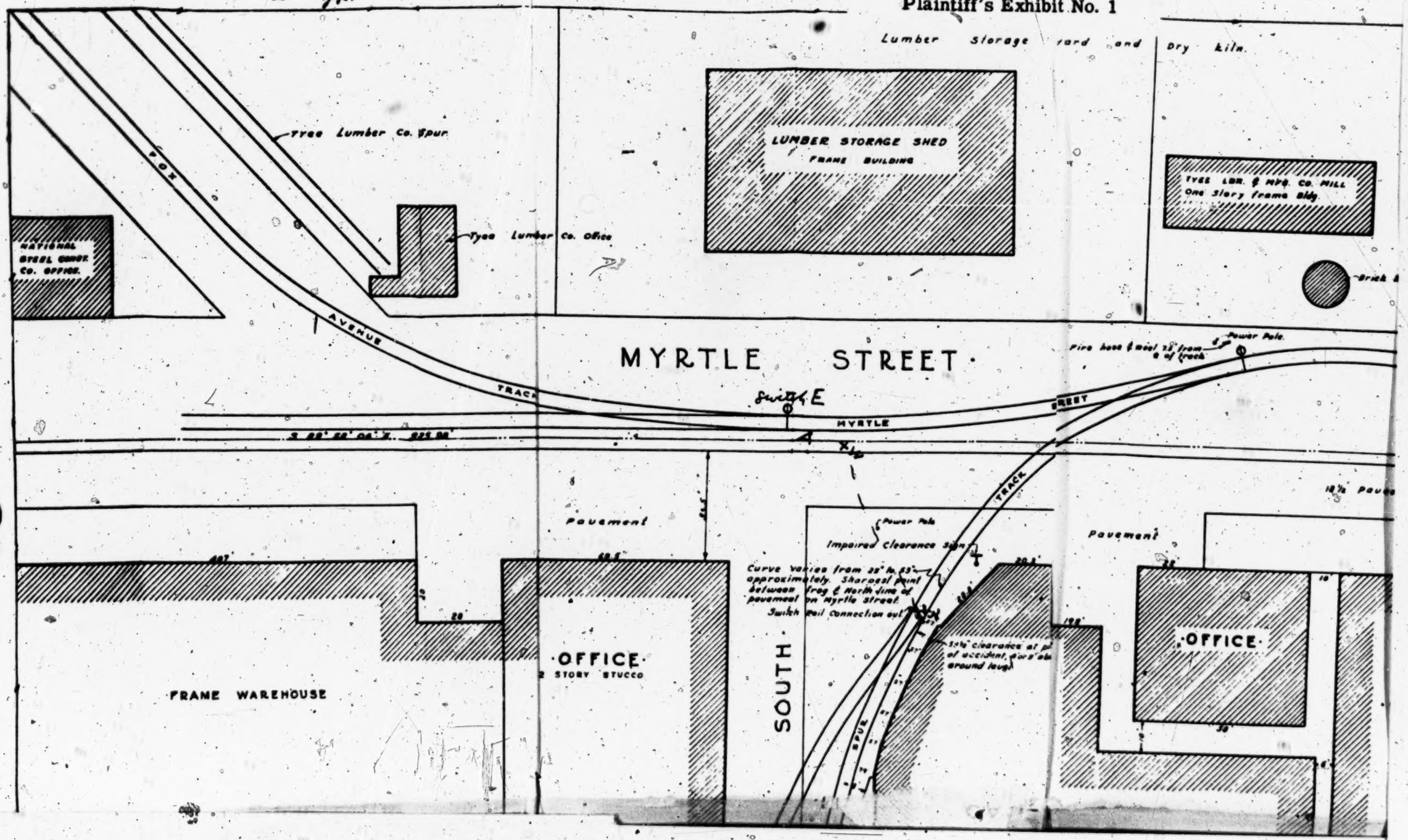
Opening Statement on behalf of the Plaintiff by Mr. W. A. Tautges, of counsel for Plaintiff.

Opening Statement on behalf of the Defendant by Mr. Robert B. Hamer, of counsel for Defendant.

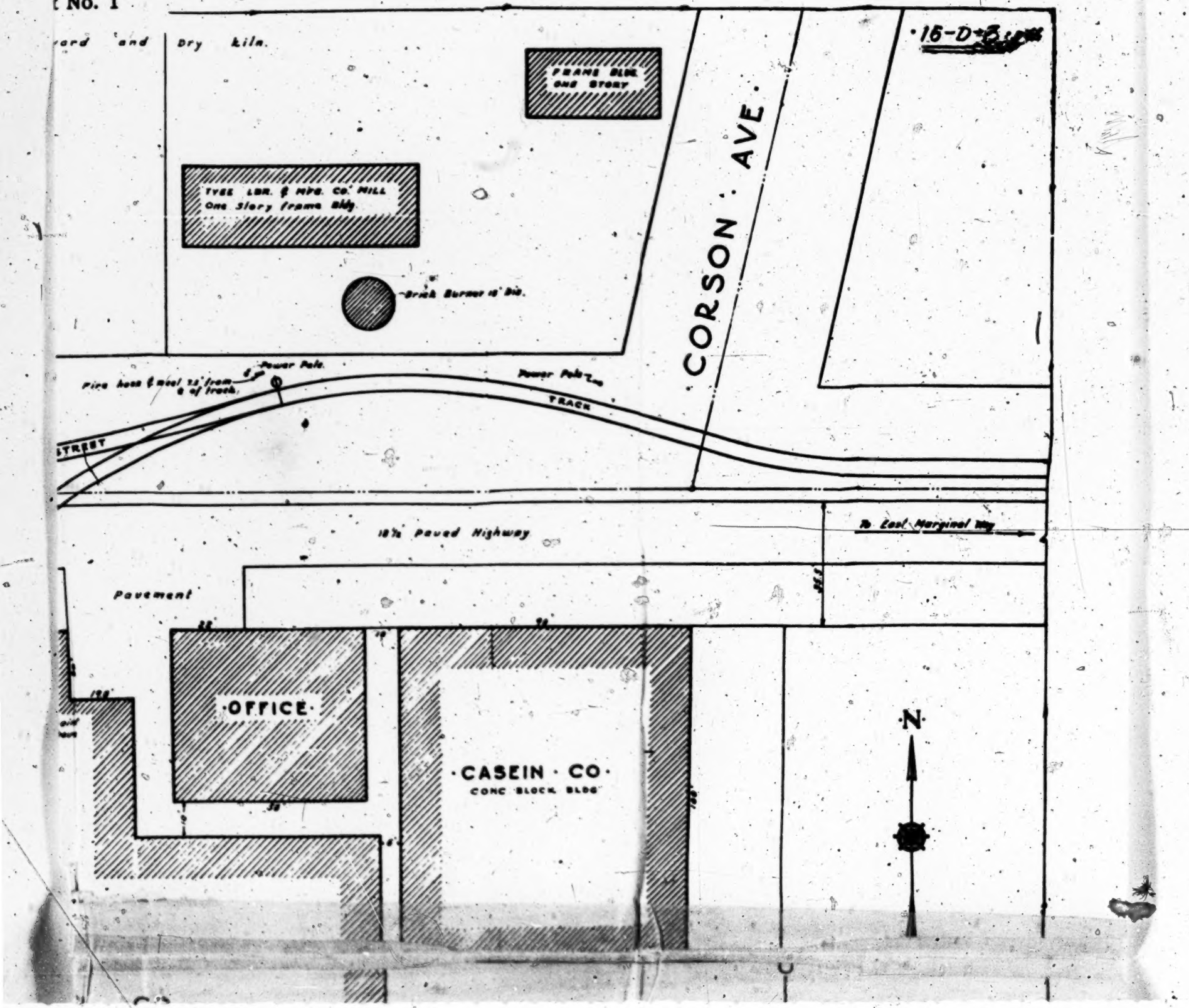
The Plaintiff, in order to maintain the issues on his behalf to be maintained, adduced evidence as follows:

[Here follows photolithograph side folio 47]

Plaintiff's Exhibit No. 1



t No. 1


yard and Dry Kiln.
FRAME BLDG. ONE STORY
TYEE LBR. & MFG. CO. MILL One Story frame Bldg.
Brick Burner 10' Dia.
CORSON AVE.
16-D
Power Pole
Fire hose & reel 25' from S of track.
Power Pole
TRACK
STREET
18½ Paved Highway
To East Marginal Way
Pavement
OFFICE
CASEIN CO.
CONC BLOCK BLDG
N

[fol. 48] STIPULATIONS OF COUNSEL AS TO CERTAIN FACTS

Mr. Tautges: Mr. Hamer, I suppose we might as well stipulate in the record that Plaintiff, at the time he was injured was subject to and within the protection of the Federal Employer's Liability Act.

Mr. Hamer: Yes, that is agreed to. There is no question about the fact that Mr. Ellis' duties as an employee of the Defendant were such as to bring him within the terms of the Federal Employer's Liability Act, as amended.

Mr. Tautges: I suppose we should have this plat marked as an exhibit, and may it be introduced for the purpose of illustration?

Mr. Hamer: Well, if it is introduced I don't want to limit its purpose.

Mr. Tautges: Well, it may be stipulated that it is drawn to scale, and that the scale is, one inch on the plat represents twenty feet on the ground, and that as to some of the figures on the plat, that is, measurements, you will supply some additional evidence as to that.

Mr. Hamer: That is correct, as to certain measurements. I might say, to avoid some of the mystery about this, Mr. Tautges and I have agreed that the plat correctly portrays the situation as it existed in May, 1944, at the time the engineer who prepared the plat made this survey, and I have advised him that I will produce other witnesses who will testify that the situation was the same in April and May, 1944, as it was on March 15, 1943. That is right is it not, Mr. Tautges?

Mr. Tautges: Yes.

Mr. Hamer: We have also agreed to stipulate that the plat does correctly reflect the situation as previously stated, except he is not admitting that the impaired clearance [fol. 49] sign shown on the plat was in the position shown on March 15, 1943, and he therefore will not be bound by that.

Do you want to agree on these distances here? The differences are that yours were taken on the ground and ours were taken four or five feet from the ground.

Mr. Tautges: I think we may agree that they are substantially correct. There may be a difference of an inch or two. Is that satisfactory?

Mr. Hamer: That is satisfactory.

Mr. Tautges: And also that this track shown to the west of the spur has been partly covered up or torn up, I have forgotten which.

Mr. Hamer: I think it still exists just as it is shown in the plat, but it is not in use and has not been in use for a period of years, and was not connected with the spur on March 15, 1943.

Mr. Tautges: Well, part of the ground has been filled in so that part of it doesn't show.

Mr. Hamer: It shows if you are immediately over it, Mr. Tautges.

Mr. Tautges: Well, I think that is close enough. Exhibit number 1 is offered in evidence, subject to the agreements stipulated into the record by counsel. Is that all right?

Mr. Hamer: That is all right.

(Plaintiff's Exhibit number 1 having been offered in evidence and received without objection, same is made a part of this Bill of Exceptions, and is attached separately.

[fol. 50] Mr. Newton W. Ellis, called as a witness on his own behalf as plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tautges:

7 Q. Mr. Ellis, what is your full name?
A. Newton W. Ellis.
8 Q. You are the plaintiff in this case?
A. Yes.
9 Q. What is your age?
A. Forty-two.
10 Q. By that you mean forty-two years?
A. Yes, forty-two years old.
11 Q. Where is your home or residence?
A. Port Orchard, Washington.
12 Q. How far is that from the City of Seattle, Washington?
A. About eighteen miles.
13 Q. On March 15, 1943, were you in the employ of the defendant railroad company?
A. Yes.

14 Q. At that time how long had you been in the employ of the defendant railroad company?

A. Since April, 1942.

15 Q. Prior to April, 1942, what was your business or occupation?

A. Plastering.

16 Q. How long had you followed that trade?

A. Oh, I imagine around fifteen years.

17 Q. Where did you follow that trade?

A. At Bremerton. That is right across from Port Orchard; at Port Angeles, Washington, and also at Salem, Oregon.

[fol. 51] 18 Q. In your trade as a plasterer did you have occasion to use one hand and arm more than the other?

A. Yes, if you are left handed you use your left hand the most, and if you are right handed you use your right hand the most, and I was right handed.

19 Q. You are what is known as a right handed man?

A. Yes, that is true.

20 Q. In the course of your work as a plasterer was your right hand and arm developed to a considerable extent more than the left?

A. Yes, naturally it would be.

21 Q. Where were you born?

A. At Harrisburg, Idaho.

22 Q. What schooling did you have?

A. I went through the eighth grade and had about one year in high school.

23 Q. What was the first work that you ever did?

A. After school, you mean?

24 Q. Yes, after you got out of school?

A. I was farming with my father.

25 Q. Where was that?

A. That was in Idaho and in Oregon.

26 Q. Are you a married man?

A. Yes, sir.

27 Q. At what age did you marry?

A. Seventeen.

28 Q. And since you have been seventeen years of age have you been engaged in work of some kind or other until the time you were injured on March 15, 1943?

A. Yes.

[fol. 52] 29 Q. Prior to working for the Union Pacific Railroad Company had you ever been employed by and worked for any other railroad company?

A. Yes, I worked for the Southern Pacific.

30 Q. When was that?

A. In 1922 and 1923, somewhere along there.

31 Q. How long did you work for the Southern Pacific?

A. About a year.

32 Q. What type of work did you do for the Southern Pacific?

A. I was a brakeman.

33 Q. After you stopped working for the Southern Pacific in 1922 or 1923, did you work for any other railroad company until you went to work for the Union Pacific Railroad Company?

A. No.

34 Q. When you started to work for the Union Pacific Railroad Company,—in April, 1942, was that?

A. Yes.

35 Q. What type of work did you do for that Company?

A. I was a brakeman and a switchman.

36 Q. Where did you work for the Union Pacific?

A. In the Argo Yards at Seattle.

37 Q. What type of work did you do mostly in the Argo Yards?

A. Well, switching of box cars.

38 Q. The Argo Yard, is that quite a large yard?

A. Yes, it is.

39 Q. And your work in the Argo Yard, did that have to do mostly with making up and breaking up trains?

A. Yes, that is true.

[fol. 53] 40 Q. This job that you were working on at the time you got hurt, March 15, 1943, what sort of a job was that?

A. That was in the industrial section, industrial work.

41 Q. I didn't quite hear that.

A. Industrial work in the industrial section.

42 Q. By industrial work, will you tell us what that means?

A. Well, it would be getting loads, or taking empties or loads to the industries.

43 Q. In doing that type of work was that confined to within the limits of the Argo Yard, or did that take you outside of the Argo Yard?

A. That is outside of the Argo Yard.

44 Q. When did you first start doing industrial work for the Union Pacific?

A. Well, I don't know. I done some in the summer of 1942.

45 Q. What is that?

A. I done some in the summer of 1942.

46 Q. In what capacity did you work in that type of work?

A. In 1942 I was a helper.

47 Q. That would be a helper switchman?

A. Yes.

48 Q. Some time after that were you promoted?

A. I was promoted in February of 1943.

49 Q. To what were you promoted?

A. Foreman of a switch engine.

50 Q. Now then, while you were employed as helper, or later as a switch foreman, did you work on different shifts?

A. Yes.

[fol. 54] 51 Q. While working as a helper on what shifts did you generally work?

A. I generally worked on the night shifts.

52 Q. What was the reason or occasion for that?

A. Well, a new man is on the extra board and gets the night work, and after you get to have a regular job it would naturally be at night.

53 Q. Then after you were promoted to switch foreman on what shift did you work?

A. Well, I believe the first shift was a ten-thirty night job.

54 Q. At the time of the accident on what shift were you working?

A. Four o'clock in the evening.

55 Q. That is, you started to work at four o'clock in the afternoon?

A. Yes, sir.

56 Q. And you would work eight hours?

A. Yes.

57 Q. Calling your attention to Exhibit number 1, which is a map or plat, have you had occasion to see that?

A. Yes.

58 Q. Prior to March 15, 1943 had you, either as a switch foreman or as a switchman helper, ever worked in on the Casein Spur track shown on that exhibit?

A. No.

59 Q. And prior to the time you were injured were you familiar with the condition of the Casein Spur track, or its closeness to the Casein Building?

Mr. Hamer, Jr: Objected to as leading and suggestive and calling for a conclusion.

[fol. 55] The Court: That would be calling for a conclusion I think. Let him testify to the facts.

Plaintiff excepts.

60 Q. Well, what is the fact, Mr. Ellis, as to whether or not prior to the time of the accident you knew or had any knowledge of what the clearance was between the Casein Building and the Casein Spur track?

Mr. Hamer: Objected to as leading and suggestive and calling for a conclusion.

The Court: Overruled.

Defendant excepts.

A. No.

61 Q. Prior to the time that you were injured what is the fact as to whether or not you had any knowledge of the degree of curvature in the Casein Spur track?

A. No.

62 Q. Did you on March 15, 1943, go to work as a switch foreman on a crew at four o'clock in the afternoon?

A. Yes.

63 Q. Of whom did that crew consist?

A. There were two helpers and the engineer and the fireman.

64. Q. What was the name of your engineer?

A. Buzard.

65 Q. What was the name of the fireman?

A. I don't remember his name.

66 Q. Who were the switchmen helpers?

A. A man by the name of Field, and a man by the name of Brown.

67 Q, And in what capacity in the crew did each of those two switchmen work?

[fol. 56] A. As helpers.

68 Q. Yes, but did they have any different classification?

A. Well, one would be the head man and the other would be the field man.

69 Q. Which of the two was the field man?

A. Mr. Brown.

70 Q. Who was the head man?

A. Mr. Field.

71 Q. Do you remember what work you and your crew did before you went to the Casein Spur track?

A. Well, as near as I can remember we went up to the Boeing plant to get some loads from Boeing.

72 Q. How far removed from the Casein Company plant was that work carried on?

A. That is no where near it.

73 Q. Well, can you tell us approximately how far?

A. Oh, about a mile I imagine, or a mile and half.

74 Q. Then while you were working in the afternoon did you receive instructions from anyone to go to the Casein Spur track to do any work?

A. Yes.

75 Q. From whom did you get those instructions?

A. Mr. Ross.

76 Q. Who was Mr. Ross?

A. The yard master.

77 Q. What instructions did you get from him?

A. That there was a load at the Casein plant to come out.

78 Q. What time did you get over to the Casein plant?

[fol. 57] A. It was approximately seven o'clock.

79 Q. Now then, will you tell the Court and Jury how and by what means you came over to where the Casein plant was?

A. You mean after we had been to the Boeing plant?

80 Q. Yes.

A. After we came from Boeing's we left the cars on the passing track out at Marginal Way and cut the engine off and went in with the engine only, a light engine as we call it, and went down to the Casein Company.

81 Q. Can you show on this plat here what track you came in on?

A. We came in on that Fox Avenue track, (indicating).

82 Q. Can you point out the track on this plat?

A. We came in on this track right here, (indicating).

83 Q. And that track, on the plat, is designated as Fox Avenue track?

A. Yes.

84 Q. Then does that track run into or connect with another track that has a different name or designation?

A. Well, it connects with the Myrtle Street track.

85 Q. And the Myrtle Street track is shown on the plat as a continuation of the Fox Avenue track?

A. Yes.

86 Q. Here is the Fox Avenue track, (indicating) and then as that continues it is marked or designated as Myrtle Street track. Is that right?

A. Yes.

87 Q. Now then, where the Fox Avenue track comes into the Myrtle Street track, is there a switch in there?

A. Yes.

[fol. 58]. 88 Q. Would you point that out on the plat?

A. Yes, sir, right there, (indicating).

Mr. Tautges: Now we will mark that as "Switch" and put the letter "E" after it to designate Ellis, the place where he indicates the switch to be.

89 Q. Now there is also a switch where the Casein Spur track connects up with the Myrtle Street track, is there not?

A. Yes.

90 Q. And that switch is a short distance west of a place marked "Power Pole" on the plat. Is that right?

A. No, east.

91 Q. The switch I am speaking of is indicated with a small circle with a line drawn through it?

A. Yes, sir.

92 Q. That is the switch connecting up the Casein Spur track and the Myrtle Street track?

A. Yes, sir.

93 Q. Now as this locomotive engine came in on the Fox Avenue track, in which direction was that locomotive headed?

A. Well, that would be east.

94 Q. It would be east?

A. Yes.

95 Q. As I understand it when you came in toward the Casein plant that was about seven o'clock in the evening, was it?

A. Yes.

96 Q. And as you came in on the Fox Avenue track and the engine proceeded east on the Myrtle Street track, there were no cars attached to the engine at that time?

[fol. 59] A. No.

97 Q. Now as the engine came in on the Fox Avenue track and as it approached and got to this switch where the Myrtle Street track begins, that switch being designated

by the word "Switch" written above the small circle there, and the initial "E" opposite the word "Switch", at what speed, if any, was that locomotive moving?

Mr. Hamer, Jr: Objected to as being immaterial, not tending to prove or disprove any of the issues in this case.

Mr. Tautges: Well, that is simply preliminary.

The Court: I will let him answer the question.

Defendant excepts.

A. It would be going real slow. If I remember right, we stopped there at that switch.

98 Q. Well, whether the locomotive stopped or didn't stop at that switch, when it came to that point were you riding the locomotive or tender?

A. Yes, I was riding the footboard.

99 Q. And which footboard was that?

A. Well, that would be the rear one.

100 Q. Now at or about where that switch is, what is the fact as to whether or not you dismounted from the locomotive?

A. Yes, I got off right there by that switch.

101 Q. After you got off from the locomotive at that point, what did you do?

A. I walked back down next to the pavement there, to the Casein Company plant.

[fol. 60] 102 Q. Can you mark out on the plat where you got off and the course that you took in walking after that, making a dotted line?

A. Yes, sir. (Witness does as requested). Right along there.

103 Q. The dotted lead pencil line that you have indicated on the plat here, marked "A" at one end and "B" at the other end, does that show substantially the course that you took after getting off the footboard of the engine?

A. Yes, that is approximately it.

104 Q. Why did you get off and why did you take the course that you did?

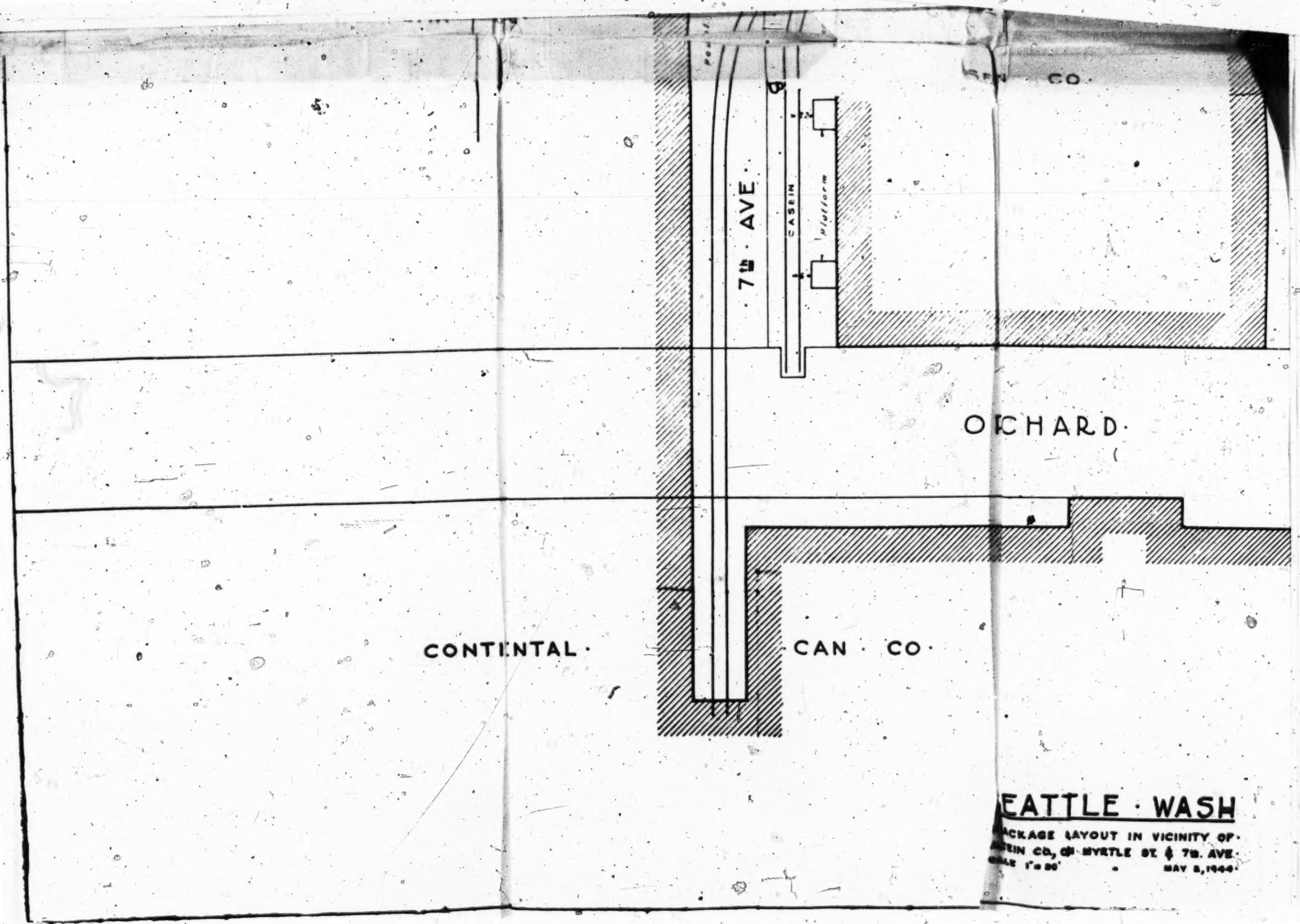
A. I walked back to the cars to see which one we were going to get. There were two cars in there.

105 Q. You had instructions to get a car off of the Casein Spur track, did you?

A. Yes.

106 Q. What did you walk over to the cars for?

A. To see which one it was.


7th · AVE ·
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platform
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EIN CO, OF MYRTLE ST. & 7TH. AVE ·
MAY 8, 1944 ·

STREET
7½ AVE. S.

107 Q. And when you got over there how did you find out which one it was?

A. There is a switch tag on the car that tells where it goes and whether it is loaded or empty.

108 Q. And had you been supplied with some information as to which car you were to get out of the Casein Spur track before you went over there?

A. Only that there was a loaded car there.

109 Q. And when you got over to the Casein Spur track which of the two cars did you find it was that you were to take out of there?

[fol. 61] A. It was the one at the second platform, or the one farthest south.

110 Q. Now then, in order to get that car out of that track, what did you have to do?

A. Well, I had to signal the boys to come back in there and they proceeded with the engine on to the Casein Spur switch and backed in to the first car and coupled into it and into the second car and coupled it on there.

111 Q. And while that movement was being made, where were you?

A. Standing by the car.

112 Q. And on which side of the track?

A. I don't remember which side it was. There was a tag on it and I don't know on which side they put the tag, so I don't remember on which side I was standing. It would probably be on the inside.

113 Q. After the engine had coupled on to those two cars, what was the next move that was made?

A. The engine pulled the two cars out over the switch there, and Myrtle Street and Casein switch.

114 Q. In which direction did the engine and cars move on that movement?

A. That would be in a northerly or northeasterly direction. Toward Myrtle Street is north and after you get out it would be to the northeast.

115 Q. Did the engine and the two cars pull off from the Casein Spur?

A. Yes.

116 Q. Do you remember who gave the signal, if any was given, for that movement?

A. No, I don't.

117 Q. What was done immediately after that movement?

[fol. 62] A. I think the boys coupled on to a tank car that was setting out on the spur.

118 Q. Did the engine and the two cars it had hold of have to get out on the Myrtle Street track?

A. Yes, they had to get out over that switch.

119 Q. And did they have to move far enough east to get past that switch?

A. Yes.

120 Q. And after the engine and cars got past, or east of that switch, what was the next move?

A. They had to back up to set the other car out there on the switch.

121 Q. They had to back west on the Myrtle Street track?

A. Yes, that is right.

122 Q. How far west did they have to move?

A. Well, I don't know. Down past the curve there, because they don't uncouple very well where there is a curve in the track.

123 Q. Well, did you have to clear — (interrupted).

A. They had to clear the Casein track.

124 Q. You had to clear that switch, did you not?

A. Yes, sir.

125 Q. They had to set this other car in the clear of the Casein Switch?

A. Yes, sir.

126 Q. After the engine and those two cars moved west along the Myrtle Street track, who was it that uncoupled the most westerly car from the other one?

A. I did.

[fol. 63] 127 Q. Then how did you get back from where you were by the Casein Spur track to that point where you made the uncoupling?

A. I walked back.

128 Q. On which side of the Casein Spur track did you walk?

A. On the west side.

129 Q. Now then, after you uncoupled on the Myrtle Street track what was the next movement that was made?

A. They had to pull up over the switch to bring the car back to be re-spotted.

130 Q. Who threw that switch?

A. I don't remember. I think it was Field.

131 Q. Would that be the duty of the man following the engine?

A. That is the duty of the head man, yes.

132 Q. Then after that was done did the engine start to move one car back in on to the Casein Spur track?

A. Yes, that is right.

133 Q. Will you describe that movement and what, if anything, you did during the course of that movement?

A. Well, after we was over the switch, — after we started to back in, do you mean?

134 Q. Yes.

A. After we started to back in I stepped away across the street from where I had uncoupled and watched the crossing. I looked down the road and there was no cars coming. I walked over to the Casein Company Building ahead of the car. As the car got down to this corner of the building, (indicating) in passing me it caught me.

135 Q. Well, can you indicate on this plat where you were flagging, and which way you went?

[fol. 64] A. I was flagging right here, somewhere near this Power pole, (indicating).

136 Q. Place in a mark on the plat where you stood when you were flagging.

A. (Witness does as requested). Right here.

137 Q. While you were flagging were you on the paved portion of Myrtle Street?

A. Yes, on the paved portion.

138 Q. Can you indicate on here about where you were?

A. Right about in there, (indicating).

139 Q. We will put an "X" there with a "W" after it. Then from that point where did you go?

A. I went across here, (indicating) right in by this jog in the building.

140 Q. Can you indicate that by a dotted line, just as accurately as you can?

A. (Witness draws dotted line).

141 Q. Now at the end of that dotted line we will put another check mark, and we will put a "Y" there. Now Mr. Ellis, why did you go from the point "X-W" to the point "X-Y", to the easterly side of the Casein Spur track?

A. To pass signals.

142 Q. Why did you take that side to pass signals?

A. It is the side the crew works on, the engineer's side.

143 Q. And was that the usual and customary side to work on in passing signals?

A. Yes.

144 Q. Now then after you crossed the Casein Spur track and got approximately to the place marked "Y" at the end of that dotted line, where was the engine and car while you were walking over that ground?

[fol. 65] A. Well, they were coming back in on the spur there, the Casein Spur.

145 Q. And the engine in coming over the Casein Spur, did the engine and the car have to cross the paved part of Myrtle Street?

A. Yes.

146 Q. And when you crossed the Casein Spur track at that time, how far was the car away that the engine was bringing in on the Casein Spur track?

A. How far was the car away from me?

147 Q. Yes, when you crossed the track?

A. Well, I don't know. It would be somewhere near the pavement there at the edge of the building, the north edge of this building.

148 Q. After you crossed the Casein Spur track and the engine and car was coming, I take it the engine was pushing or shoving the car, was it not?

A. Yes, it was shoving the car.

149 Q. And the car at that time was coupled on to the tender of the engine, was it?

A. Yes, to the tank, the oil tank.

150 Q. And the front of the engine was headed toward the north or northeast, was it not?

A. Yes, it was headed north.

151 Q. After you crossed the track and got over on to the east side of this Casein Spur track did you make any observation to see the engineer?

A. Yes.

[fol. 66] 152 Q. Just tell us what you did and how you did it.

A. I looked toward the engineer and looked to see Mr. Brown, to see where he was.

153 Q. What is that?

A. I looked at the engineer then turned to see where Mr. Brown was.

154 Q. Well when you looked in the direction of the engineer what was he doing?

A. He was watching me.

155 Q. Then you say you looked in the direction of Mr. Brown?

A. Yes.

156 Q. Where was Mr. Brown supposed to be?

A. He was supposed to be at the loading platform, that is, the first one.

157 Q. Would that be the first loading platform that is shown on the plat here?

A. Yes, the first one.

158 Q. Is that the place where this car was going to be spotted that was being shoved in by the engine?

A. Yes, that is where it was to be re-spotted.

159 Q. Why were you looking to see where Mr. Brown was?

A. I wanted to see if he was at the platform or not, to pass signals.

160 Q. Was it part of your duty or not to give Mr. Brown signals, or be in a position to either give or take a signal from Mr. Brown?

A. Yes, that is right.

161 Q. Was it also your duty to be in a position to be able to either give a signal to the engineer, or to transmit a signal that you might get from Mr. Brown?

[fol. 67] A. Yes, that is true.

162 Q. Now then, after you crossed the Casein Spur track for the purpose of being in position to either take or give signals, do you recall whether or not you moved for some distance either to the south or north?

A. I don't recall. I moved a few feet in there, yes, toward the south.

163 Q. Why did you do that?

A. To get a better view.

164 Q. To get a better view of what?

A. To see if I could get a better view of Brown. It is on a curve.

165 Q. While you were in that position between the Casein Spur track and the Casein Company Building, what happened?

A. Well, I looked to see Mr. Brown and I couldn't see him, and the end of the car went by and just as I looked back toward the engineer again, the middle of the car caught me.

166 Q. The front end of the car, when that went by did that clear you in good shape?

A. Yes, if it hadn't it would have pushed me out of there.

167 Q. How much of the car got by you before you got into trouble?

A. About half of it.

168 Q. Up to the time that that car came in contact with you did you know that you were either in a place of danger or where there was insufficient clearance?

A. I didn't know it.

169 Q. Now then when the car came in contact with you, just tell the Court and Jury what happened.

[fol. 68] A. Up until the time the car came in contact with me, the end of the car had just passed me and the middle of the car caught me and knocked me unconscious.

170 Q. What is your last recollection of what happened there?

A. I don't recollect anything that happened there.

171 Q. Do you remember the car striking you?

A. Yes, I remember it just striking me.

172 Q. And do you remember getting caught between the car and the building?

A. No, I don't remember anything about it.

173 Q. What is the next recollection that you have?

A. The next recollection I have when I came to, it came to my mind that my little girl was calling me to get up and go to work, and I started to raise up and I fell right back down again.

174 Q. Where were you at that time?

A. On the ground.

175 Q. On the ground where?

A. By the Casein Company Building.

176 Q. On which side of the track?

A. The east side.

177 Q. That is, at that time you were between the Casein Building and the track?

A. Yes.

178 Q. Who said something to you?

A. I thought my little girl told me it was time to go to work.

179 Q. You thought what?

A. I thought my little girl had told me it was time to go to work.

180 Q. Did you realize at that time where you were?

A. No, not until I tried to raise up.

181 Q. Well when you tried to raise up was anybody there?

[fol. 69] A. Yes, the crew was there.

182 Q. What is it?

A. The switching crew was there.

183 Q. Where was the car at that time?

A. I don't remember. It was on the track there near me some place.

184 Q. Have you any recollection as to how you were taken out or loosened up from between the building and the car.

A. No, I do not have.

185 Q. Have you any recollection of the car being moved ahead or back in order to get you out of there after you were caught in there?

A. No.

186 Q. What is your next recollection after you realized that the crew was there? That is, I am talking about after you had been hurt.

A. I remember when they put me in the ambulance.

187 Q. Was there a period of time when you were completely unconscious?

A. Yes.

188 Q. I take it that you have no recollection, yourself, as to how long you were unconscious?

A. No, I don't.

189 Q. You say you do remember of being helped into the ambulance?

A. Yes.

190 Q. Have you any recollection as to how you were placed in the ambulance?

A. No, I don't remember that.

191 Q. Have you any recollection of a ride in the ambulance to the hospital?

[fol. 70] A. Yes.

192 Q. What recollection have you of that?

A. I remember the pain I was going through and whenever it hit a bump or jarred me, it hurt a great deal.

193 Q. How far is it from the place where you were hurt over to the hospital to which you were taken?

A. Oh, I would say about three miles.

194 Q. During that ride were you conscious all the time, or not?

A. I don't know. I don't think so.

195 Q. During that ride do you remember of suffering any pain?

A. Yes, when it would hit a bump or jar me or anything I could feel it, sure.

196 Q. Where did it hurt?

A. In my chest.

197 Q. During the ride from the place of the accident to the hospital, were you able to sit up?

A. No.

198 Q. Were you able to move either of your arms?

A. No.

199 Q. Were you able to move your head?

A. No, — I don't remember whether I could or not.

200 Q. When you arrived at the hospital what was done with you?

A. Well, they took me to a room, a room in the Providence Hospital.

201 Q. Were you put to bed?

A. Not immediately, no. They took my clothes off first.

202 Q. Do you remember how your clothes were removed?

A. They were cut off.

[fol. 71] 203 Q. And then it was after that that you were put to bed?

A. Yes.

204 Q. Did any doctor attend you when you arrived at the hospital?

A. No, they did not.

205 Q. So far as you know when did you first have a doctor at the hospital?

A. The next day, about four o'clock in the evening.

206 Q. What doctor was that?

A. Dr. Hutchinson.

207 Q. Was he the house doctor at the hospital?

A. No, he was a chest specialist.

208 Q. This hospital that you were taken to, was that the railroad company's hospital?

A. I believe they have some kind of a contract with them.

209 Q. Then after Dr. Hutchinson attended you, and you said he was a chest specialist, what was done with you after that?

A. I don't remember what was done to me. They gave me opiates all the time.

210 Q. Before Dr. Hutchinson attended you had you been

given any hypodermics, — any hypodermic injections of any kind to relieve your pain?

A. Yes.

211 Q. Who gave those?

A. I don't know who gave them to me.

212 Q. Somebody in the hospital?

A. An interne or a nurse.

213 Q. Your first night in the hospital, have you any recollection as to your condition during that time?

[fol. 72] A. No, I didn't know anything about it.

214 Q. After Dr. Hutchinson attended you, which you say was the day after, about four o'clock in the afternoon, how frequently did you have medical attention in the hospital?

A. What do you mean by that? How frequently was the doctor there?

215 Q. Yes, how frequently did the doctor attend you, or any nurse?

A. I had three special nurses.

216 Q. For what length of time?

A. I had three nurses for about a week or ten days, then they let one nurse go and kept two for about two weeks, and I had one special nurse up until a week before I left the hospital.

217 Q. During that period of time were you suffering any pain?

A. Yes, a lot of pain.

218 Q. Where did you suffer pain?

A. In my chest and ribs and side, and on the clavicle, and my arm.

219 Q. In what part of your chest did you have the more severe pain?

A. On the right side.

220 Q. While you were in the hospital do you know whether you had pneumonia?

A. Yes.

221 Q. How soon was that after you got into the hospital?

A. I don't know how soon. I know I had it. When it started I wouldn't know.

222 Q. What treatment did you get for that?

A. They gave me sulfa drugs and extracted this phlegm out of the lungs and took a hypodermic needle and used it in my back.

[fol.] 223 Q. Were you in an oxygen tent at all?

A. I had an oxygen tank. It wasn't a tent.

224 Q. Have you any recollection as to how long it was after you got into the hospital that you had this pneumonia?

225 Q. How long it was I had it altogether, you mean?

A. When did you first get treatment for pneumonia?

A. I don't know.

226 Q. Well, was it the first week, or later?

A. Well, it may have been the first week, yes.

227 Q. While you were in the hospital were you X-rayed at any time?

A. Yes.

228 Q. When was that with respect to the time you entered the hospital?

A. I imagine the first time was the second or third day I was in there.

229 Q. After you were X-rayed were you advised as to whether or not you had any rib fractures?

A. Yes, they told me there were seventeen fractures of the ribs.

230 Q. And were there fractures of ribs on both sides of your body?

A. Yes, ribs on both sides. Some ribs were fractured several times.

231 Q. Now with respect to the right arm and shoulder, what trouble did you have there while in the hospital?

A. I had a dislocated clavicle, and still have.

232 Q. Will you point to the region of that?

A. It is right in here.

233 Q. While you were in the hospital was any cast applied to any part of your body?

A. Not the first time.

[fol. 74] 234 Q. At any time while you were in the hospital?

A. The second time I went to the hospital they put me in a cast.

235 Q. How long were you in the hospital the first time?

A. Six weeks.

236 Q. How much of that time were you in bed?

A. All the time.

237 Q. During all that period of time what was your condition as to whether or not you suffered pain?

A. Well, they gave me shots all the time to keep the pain down.

238 Q. Well, did you suffer pain or not, during that six week period?

A. Yes, I sure did, yes.

239 Q. During that six week period in the hospital in what position was your right arm kept or maintained?

A. Down by my side. I couldn't move it.

240 Q. During that six week period were you able to be up and about in the hospital?

A. The last week I was there the nurse helped me and I walked around a little bit. She would let me walk across the room and back.

241 Q. During that six week period in the hospital what sensation, if any, did you have in your right arm?

A. Well, it felt like it was about paralyzed. It was numb and it hurt. There was a lot of pain in it. The nerves were all disrupted in the right side.

Mr. Hamer: I move to strike the answer, the nerves were all disrupted on the right side, as not responsive to the question and a conclusion on the part of this witness.

The Court: It may go out.

Plaintiff excepts.

[fol. 75] 242 Q. Now Mr. Ellis, after you were in the hospital for six weeks, did you leave the hospital?

A. Yes.

243 Q. Where did you go then?

A. I went home.

244 Q. How long did you remain at home?

A. Well, let me see. I left the hospital, — well, I was at home a little better than a month.

245 Q. During that time did you have any medical attention?

A. Yes.

246 Q. Tell us about that.

A. I had to go to Seattle to get it, and I was over there, —(interrupted).

247 Q. Over to Seattle?

A. Yes, and I was over there, Oh, I imagine about once a week.

248 Q. How did you get over there?

A. In a car.

249 Q. Did someone go with you?

A. My son drove me.

250 Q. You were unable at that time to drive an automobile?

A. Yes, I couldn't drive a car.

251 Q. During that month you were at home after leaving the hospital, what use, if any, did you have of your right arm?

A. I didn't have any, outside of I could move my fingers like this, (indicating) down at my side.

252 Q. With respect to your left arm and shoulder, did you have any trouble with that?

A. No, not so much. Up in here there was a great deal of pain where the rib was fractured.

[fol. 76] 253 Q. During the period of time while you were at home, what pain, if any, did you suffer?

A. I suffered a lot of pain.

254 Q. And where?

A. In the side and chest, — the right side hurt the most.

255 Q. During the time you were at home did you have any difficulty in sleeping?

A. Yes, lots of it.

256 Q. Just tell us what trouble you did have.

A. I had to lay flat on my back all the time, and that gets very tiresome. I would wake up and doze off and I suffered a great deal.

257 Q. After you were at home for a month did you get any further or different medical treatment?

A. Yes, I went back to the hospital again.

258 Q. Which hospital?

A. The Providence Hospital.

259 Q. That is the same one you were in for six weeks?

A. Yes.

260 Q. How long did you remain there at that time?

A. I was there about a week at that time.

261 Q. What, if anything, was done for you during that week?

The Court: We will adjourn at this time until 9:30 tomorrow morning.

(Court reconvened at 9:30 A.M., May 9, 1944, pursuant to adjournment, and Mr. Ellis was recalled to the witness stand by Mr. Tautges and testified in his own behalf as plaintiff, as follows):

[fol. 77] 262 Q. Mr. Ellis, when you left the hospital the first time you testified that you either went or were taken to your home.

A. Yes.

263 Q. Was that at Port Orchard, Washington?

A. Yes, at Port Orchard, Washington.

264 Q. Who took you from the hospital to your home?

A. My three boys came over and got me in the car.

265 Q. On that trip from the hospital to your home, how did you stand that?

A. I didn't stand it very well. After I got home they started to take me out of the car and I fainted.

266 Q. Now then, after you got home from your first stay in the hospital, were you up and about, or not?

A. I was up some. I would get up and walk around a little, with someone helping me.

267 Q. And during that period at home were you suffering pain?

Mr. Hamer: Objected to as repetition. He took him home and got him back to the hospital the second time yesterday.

Mr. Tautges: Well, I will withdraw that if it is repetition.

268 Q. Now while you were at home, were you able to dress yourself?

A. No, some of the boys or girls would help me dress.

269 Q. What difficulty did you have in getting dressed?

A. I couldn't move my arms very well. The right arm was practically paralyzed on this side.

270 Q. How about tieing your shoes or putting on your shoes? Were you able to do that?

[fol. 78] A. No, one of the kids would have to do that.

271 Q. Do you still require some assistance in dressing?

A. No, I dress myself.

272 Q. How long is it since you have been able to dress yourself?

A. Oh, about three months.

273 Q. Do you have any difficulty now in putting on or tieing your shoes?

A. Yes, it is hard for me to tie my shoes and put them on.

274 Q. Just what trouble do you have in doing that?

A. When I stoop over that way it pulls this claviele and it bothers my throat, and I can't reach very well anyway.

275 Q. Now then, getting back to your second trip to the hospital, as I understand it that was the same hospital where you were confined following the accident?

A. Yes.

276 Q. Who attended you in that hospital?

A. The second time it was Dr. Brown and Dr. McIlmore.

277 Q. Were they doctors of your own selection or were they doctors provided by the Union Pacific Railroad Company?

A. They were railroad doctors.

278 Q. How long were you in the hospital the second time?

A. I was there about a week.

279 Q. And during that stay in the hospital were you confined to bed or were you up and about?

A. Well, I was up and about a little, but I was under observation.

280 Q. What treatment did you get in the hospital the second time?

A. Well, no special treatment. They took X-rays but they didn't give me any treatments.

[fol. 79] 281 Q. Did you get any treatment after that?

A. No.

282 Q. Was any operation performed either the first or the second time?

A. No, not the first or second time, no.

283 Q. Well did you have an operation at some time?

A. Yes, I went home. In about a week they sent me home again and I was at home about a week and the 22nd of June I went back to the hospital and they performed an operation.

284 Q. So that you were in the hospital three times altogether?

A. Yes, sir.

285 Q. The next time you were there, is that when the operation was performed?

A. Yes.

286 Q. How long were you in the hospital that time?

A. Three weeks.

287 Q. How much of that time were you in bed?

A. All the time.

288 Q. What operation was performed at that time?

A. It was an open operation on the claviele.

289 Q. Will you point out where that was?

A. It was this bone right in here, (indicating).

290 Q. Was that operation performed under an anesthetic?

A. Yes.

291 Q. Now, either after that operation was performed or before, were you in a cast of some kind?

A. Yes, after the operation I was in a body cast.

292 Q. What kind of a cast?

A. They called it a body cast and aeroplane splint.

[fol. 80] 293 Q. What kind of a cast was that body cast?

A. It covered my whole chest around here, (indicating) and had my arm up like this, in a position like that, (indicating).

294 Q. That cast started about where on your body?

A. Around my hips.

295 Q. How far up did it extend?

A. Clear up to my shoulders, right across, like this, (indicating).

296 Q. Was that a plaster paris cast?

A. Plaster paris, yes.

297 Q. Then what was done with your arm? You mentioned an aeroplane splint.

A. Well, it was held up like this, in a cast, (indicating).

298 Q. That was your right arm?

A. Yes, the right arm.

299 Q. And your arm was held up to about a level with your shoulders and extended out from your body?

A. Yes, that is right.

300 Q. How long were you in that cast?

A. Nine weeks.

301 Q. And the body cast, did you have that on that long too?

A. Yes, they were all together.

302 Q. During that period of time what discomfort or distress, if any, did you have?

A. It was very annoying to have the cast on there and there was lots of pain. They gave me anesthetics or hypodermics, whatever it is called, while I was in the hospital, to ease the pain. After the pain had deadened some they let me go home in about three weeks.

[fol. 81] 303 Q. Do you recall when it was, the date when the cast was removed?

A. It was around the first of September or the latter part of August. For nine weeks I was in the cast and the operation was performed the 22nd of June.

304 Q. Since that cast was removed, tell the Court and Jury what difficulties you have, either in the way of distress or discomfort or pain.

A. I had pain all through my chest and sides and arms. The pain feels like there is a band right across here all the time. My fingers are numb and there is pain right in here, (indicating). There is more or less of an irritation in my throat. It bothers me in talking and makes me clear my throat a good deal.

305 Q. Does it cause you any distress or discomfort to have your collar fastened?

A. Yes, it does. It annoys me a lot to have anything tight around my neck.

306 Q. What is that?

A. It annoys me to have a collar fastened around my neck, or a tie.

307 Q. Now will you demonstrate to the Jury the extent to which you can move your right arm?

A. I can raise it up about like this, (indicating) and raise it around like that, (indicating) and I can bring it around like this, (indicating). When I raise it up like this, (indicating) this bone here bothers me. It hurts so bad I can't use it in that position.

308 Q. Well, can you put your right arm straight up, like that, (indicating)?

[fol. 82] A. Yes, I can make it like that. Of course it hurts when I do it.

309 Q. Can you get your right hand behind your neck?

A. Yes.

310 Q. Now with respect to the strength of your right arm, have you any degree of strength in it?

A. Well, I never measured the strength in it, or anything like that, but it isn't as strong as it was, by a lot.

311 Q. Now with your arm in the condition it is now, could you do the work of a plasterer?

A. No.

312 Q. And with your right arm and shoulder and chest in the condition they are in now, could you do the work of a railroad brakeman or switchman?

Mr. Hamer, Jr: Objected to as calling for a conclusion on the part of this witness and no foundation to show that he has ever tried it.

The Court: He may answer the question.

Defendant excepts.

A. No.

313 Q. Now then, in switching and braking you might tell the Jury what different types of work you have to do.

A. In braking you have to go up the sides of box cars; stoop over; throw switches; ride on top of cars; pass signals, and all kinds of stuff like that.

314 Q. Do you have to climb ladders?

A. Yes, we have to catch on cars while they are moving and jump off when they are moving.

[fol. 83] 315 Q. Then in braking do you sometimes have to load and unload freight?

A. Well, you probably would if you were out on the road braking, but in the yard we don't.

316 Q. In the yard you don't handle that?

A. No.

317 Q. Now at the time you were injured, and before, what was your normal weight?

A. Around 175 pounds.

318 Q. How tall a man are you?

A. About five feet, eleven inches.

319 Q. After you were injured and during the time you were confined to the hospital, did you lose weight?

A. Yes.

320 Q. How far down did you go?

A. Well, I think I was down to about 150 pounds.

321 Q. Since you got better have you picked up any weight or not?

A. Yes, I have gained it all back now, practically.

322 Q. Since you have been injured have you had any difficulty in being nervous, or not?

A. Yes.

323 Q. You might tell us about that.

A. Well, I don't sleep very well at night, and of course anyone who is suffering pain, they are nervous. I wake up several times during the night.

324 Q. Before you were hurt did you have any trouble of that kind?

A. No, never.

325 Q. Now for some time after you were first injured did you have any trouble in breathing?

[fol. 84] A. No.

326 Q. You could breathe all right. Was that attended with any pain?

A. No.

327 Q. Now since you were injured have you been examined by any doctors other than those who attended you out at the hospital?

A. Yes.

328 Q. By whom have you been examined?

A. I was examined by Dr. Fouts and Dr. Sucha in Omaha.

329 Q. When was that?

A. That was in September, I believe, of last year, 1943.

330 Q. And were you examined by any other physicians?

A. Yes, I was examined by Dr. Evans of Minneapolis.

331 Q. Were some X-rays taken at Minneapolis?

A. Yes.

332 Q. Do you remember by whom they were taken?

A. Yes.

333 Q. By whom?

A. Drs. Ude and Gorman.

334 Q. Since that time have you been examined by any other physician here in Omaha?

A. Yes, sir, Dr. Hamsa.

335 Q. When were you examined by him?

A. Oh, about four days ago, three or four days ago.

336 Q. Now Mr. Ellis; did you ever have this trouble before the accident that you have now, in your neck?

A. No.

337 Q. And prior to the happening of the accident what is the fact as to whether you were a strong, well, normal, healthy, able bodied man?

[fol. 85] A. Yes, I was.

338 Q. Getting back to the day of the accident, can you tell us something about what the condition of the ground was in and about the vicinity of that Casein Spur track?

A. Well, it was raining. It wasn't raining that day but it was in the rainy season. The ground was low in there. It was mucky and boggy.

339 Q. Did you recently take or have taken some pictures showing some of the views about the Casein Spur track?

A. Yes.

340 Q. Now calling your attention to Plaintiff's Exhibit, number 2, will you examine that and state what that is?

A. That is a picture of the side of the Casein Company Building.

341 Q. As you look into that picture, in which direction are you looking?

A. Looking south.

342 Q. In this picture there is a portion of the track?

A. Yes.

343 Q. What is that?

A. That is an unused track. There was evidently a switch in there at one time, but they have taken the switch out.

344 Q. Well is part of this track shown here the Casein Spur?

A. Yes, that main track is.

345 Q. Then there is another track seeming to run from one rail diagonally in the direction of the other rail?

A. Yes.

346 Q. What is that rail?

[fol. 86] A. It is just an ordinary rail.

347 Q. Well you mentioned something about a switch or something that had been taken out.

A. Well, I said there must have been a switch at one time taken out there.

348 Q. Well this rail that runs diagonally between the two rails, is that a section or part—(interrupted).

A. That is part of the rail, yes.

349 Q. You mean a part of the rail that is not in use any more?

A. Yes.

350 Q. But the two rails that are visible, that evidently form a track, is that part of the Casein Spur track?

A. Yes.

351 Q. And this building or wall to the left, is that a part of the wall of the Casein Building?

A. Yes, that is part of the warehouse building, yes.

352 Q. Along this wall of the building and above the ground, there is a kind of white spot.

A. Yes.

353 Q. What does that indicate?

A. That is where the sun happened to hit the building, but that is right where I was caught by the car.

354 Q. Then that white or light spot which you say was made by the rays of the sun, does that show approximately where you were located at the time the car pressed you between it and the building?

A. Yes, that is it exactly.

[fol. 87] 355 Mr. Tautges: We offer in evidence Exhibit number 2.

356 Q. When was that picture taken, Mr. Ellis?

A. Well, it was taken about a month ago, something like that. I don't remember the date.

357 Q. Some time this year?

A. Yes.

358 Q. You were present when the picture was taken?

A. Yes, I took the picture myself.

Mr. Hamer, Jr: May I ask some foundation questions, Your Honor?

The Court: Yes.

Cross examination.

By Mr. Hamer, Jr:

359 Q. Mr. Ellis, looking again at Exhibit number 2, the white spot on there, as I understand your testimony, is just a reflection on the sun, apparently off the rail?

A. I don't know what it was reflected from. We never made any white spot there, or anything, but that is just practically where I was caught.

360 Q. The indentations shown on the side of that building are just a little bit to the south of the sun spot, or whatever that is. Is that right?

A. Yes, that is right. There are the indentations. I never examined it closely, but I can see them there now.

361 Q. You can see them in this picture?

A. Yes.

362 Q. You base your testimony that this sun spot is in approximately the same position you were in at the time you were injured, by reason of the indentations which are there [fol. 88] in the side of the building, is that right?

A. Yes. There is no reason for that sun spot being there, because we never made any marks. It just happened to show there, for some reason or other.

363 Q. It is your belief, is it not, that you were standing at the place where the indentations appear in the side of the building?

A. Yes, that is right.

364 Q. Those indentations had not been there before you had this accident, had they?

A. I don't know.

365 Q. Were this building and track, as far as you know, in the same condition, as far as their location is concerned with respect to each other, at the time this picture was taken as they were on the day of the accident?

A. As far as I know, they were.

Mr. Hamer: No objection.

Plaintiff's Exhibit number 2 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exception.

(Here follows 1 photolithograph side folio 88a)

Plaintiff's Exhibit No. 2

[fol. 89] Direct examination.

Continued by Mr. Tautges:

366 Q. Mr. Ellis, calling your attention to Plaintiff's Exhibit number 3, what is that?

A. That is a picture of the Casein Building, looking north.

367 Q. In which direction are you looking in that picture?

A. You are looking north and a little bit east in that picture.

[fol. 90] 368 Q. Now in this picture is shown a car partly loaded with lumber.

A. Yes.

369 Q. And to the front of that there appears to be a white streak.

A. Yes.

370 Q. Is that a highway?

A. Yes, that is the pavement.

371 Q. And is that Myrtle Street?

A. Yes, that is right?

372 Q. In this picture there is also a man standing by the side of the building. Who is that?

A. That is me.

373 Q. When was that picture taken?

A. At the same time. They were all taken at the same time.

374 Q. That picture was taken at the same time as Exhibit number 2?

A. Yes.

375 Q. Where you are standing in that picture, does that show approximately the location that you were in, or at, at the time of the accident?

A. Yes.

376 Q. This picture also shows a curved railroad track?

A. Yes.

377 Q. Is that a part of the Casein Spur track?

A. Yes.

378 Mr. Tautges: We offer in evidence Plaintiff's Exhibit number 3.

Mr. Hamer, Jr: May I inquire what is the purpose of Exhibit number 3, Mr. Tautges?

Mr. Tautges: Well, simply for illustration.

Mr. Hamer, Jr: Well, it is objected to as no proper and [fol. 91] sufficient foundation has been laid; no attempt to show by this witness that the conditions shown in the

picture were the same on the date of the accident as they were two or three weeks ago when this picture is claimed to have been taken.

The Court: I think you are a little short on foundation, Mr. Tautges.

Plaintiff excepts.

379 Q. Well, at the time of the accident, this railroad car with lumber on it, there wasn't any such car there at the time of the accident, was there?

A. No.

380 Q. But as to the location of the building and the tracks and whatever is shown of Myrtle Street, was that the same at the time of the accident as is shown in this picture?

A. As far as I know, yes.

381 Mr. Tautges: We renew our offer of Exhibit 3.

Mr. Hamer, Jr: Objected to as no proper and sufficient foundation laid; no attempt to show that the conditions shown in the picture were the same on the date of the accident as they were two or three weeks ago when this picture is claimed to have been taken.

The Court: There is nothing to show who took the picture, is there?

382 Q. Who took the picture, Exhibit number 3, Mr. Ellis?

A. Mr. Burns.

383 Q. Were you present when that picture was taken?

A. Yes, that is me in the picture.

384 Q. And does that picture correctly show what it purports to show? Is it a true picture of everything that shows there at the time it was taken?

[fol. 92] A. Yes.

385 Mr. Tautges: Now, we will renew our offer of Exhibit number 3.

Mr. Hamer, Jr: I renew the objection.

The Court: It may be received.

Defendant excepts.

Plaintiff's Exhibit number 3 having been offered in evidence and received by the Court, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph side folio 92a)

Plaintiff's Exhibit No. 3

[fol. 93] 386 Q. Now, calling your attention to Exhibit number 4, what is that?

A. That is a picture of the rails and the side of the Casein Building. The railroad track, — that is the Casein Building there, and the frog that is in the track, and the different sized rails.

Mr. Hamer: Well, I move to strike the latter part of the answer as not responsive to the question. You just simply asked, what is the picture? He is now endeavoring to recite what is shown in there. The picture, of course, is the best evidence, and the answer as given is not responsive.

The Court: Overruled.

Defendant excepts.

387 Q. When was that picture taken?

A. The same day.

388 Q. As you look into the picture, in which direction are you looking?

A. You are looking southeast, or southwest I mean, a little bit southwest.

389 Q. Now the curved track shown in the picture, is that a part of the Casein Spur track?

[fol. 94] A. Yes.

390 Q. The building wall that is at the left of the picture, is that part of the Casein Building?

A. Yes.

391 Q. As you look into the picture there is also a section of another track shown there.

A. Yes.

392 Q. Does that picture show the Casein Spur track and also a section of another track, as it was at the time you were hurt?

A. Yes.

393 Q. As you look into the picture you also see another building. Was that building there at the time of the accident?

A. Yes.

394 Q. What building is that?

A. The Continental Can Company Building.

395 Q. And between the Continental Can Company Building and the Casein Building, was there a pavement of some kind in there?

A. Yes.

396 Q. Was that there at the time you were hurt?

A. Yes.

397 Q. There are also shown in the picture here some automobiles.

A. Yes.

398 Q. Do you know whether or not any automobiles were standing in or about that vicinity at the time of the accident?

A. No, I don't.

399 Q. Now, except for the automobiles shown in the picture, does it represent correctly the structures and general surroundings as they were at the time of the accident?

[fol. 95] A. Yes.

400 Q. As you look into the picture there seems to be a short jutting out of a portion of that Casein Building wall. Was that in that condition at the time of the accident?

A. Yes, it was.

401 Q. On this picture will you designate where you were at the time you were struck by the car?

A. No, I don't believe I can.

402 Q. Was it at some point beyond where this short jutting out of the building occurs?

A. Yes, it was beyond that.

403 Q. Can you tell us approximately how far beyond that place it was that you were at the time the accident happened? That is, I am speaking now of where this break or jut in the wall of the Casein Company Building is located.

A. You mean where the indentations in the wall; where I was supposed to have been caught?

404 Q. Yes.

A. Well, it is approximately nine feet.

405 Q. Approximately nine feet beyond that?

A. Beyond that jutted out place.

406 Mr. Tautges: I will offer in evidence Exhibit number 4.

Mr. Hamer, Jr: Defendant asks leave to ask some foundational questions concerning this exhibit.

The Court: All right.

[fol. 96] Cross examination.

By Mr. Hamer, Jr:

407 Q. Mr. Ellis, as I understand it you have now testified that this picture, Exhibit number 4, shows the tracks

and the conditions they were in on the day you were hurt?

A. No, the condition they were in on the day we took the picture.

408 Q. Did you mean to testify that this picture shows the conditions of the tracks on the day you were hurt, or that they were the same on the day you were hurt as they appear in this picture?

A. As far as I know they were, yes.

409 Q. But you don't know?

A. No, I don't know.

Mr. Hamer, Jr.: Objected to for the reason that there is no proper and sufficient foundation laid.

Mr. Tautges: Well, I will ask a few more questions.

Direct examination.

Continued by Mr. Tautges:

410 Q. How many times have you been at the scene of the accident since you were hurt?

A. About three times.

411 Q. Now, so far as the Casein Spur track is concerned, and the Casein Building, and that other building that is shown in the picture, and the position and curve of the track, and this section of other track that shows in the picture, has there been any change made in respect to those things since the day that you were there at the time of the accident?

[fol. 97] Mr. Hamer, Jr.: Objected to as no proper and sufficient foundation laid, and calling for a conclusion on the part of this witness.

The Court: Overruled.

Defendant excepts.

A. Not that I know of.

412 Q. Well, from your observations made when the picture was taken, and from your observations when you were in there the day of the accident, does it appear to you that any change of any kind has been made?

A. No.

413 Mr. Tautges: We renew our offer of Exhibit number 4.

Mr. Hamer, Jr.: We renew the objection. There is no showing at all, Your Honor, that the other conditions which are shown in this picture were the same at the time of the

accident as they were at the time this picture was taken, this witness having definitely testified that he did not observe the condition of the track on the day of the accident, and doesn't know.

The Court: What other conditions do you refer to?

Mr. Hamer, Jr.: Well, I am referring specifically to what is shown on the track itself, as distinguished from the location of the tracks.

Mr. Tautges: I might add, Your Honor, it will appear from other evidence which we will introduce in the form of depositions that there hasn't been any change made.

Mr. Hamer, Jr.: There is no contention that there ever has been any change made from the standpoint of the location of the tracks?

[fol. 98] Mr. Tautges: Well what are you objecting to then?

The Court: Well, the picture will be received for the purpose of showing the location of the tracks and the building.

Defendant excepts.

Plaintiff's Exhibit number 4 having been offered in evidence, and received by the Court, same is attached to and made a part of this Bill of Exceptions.

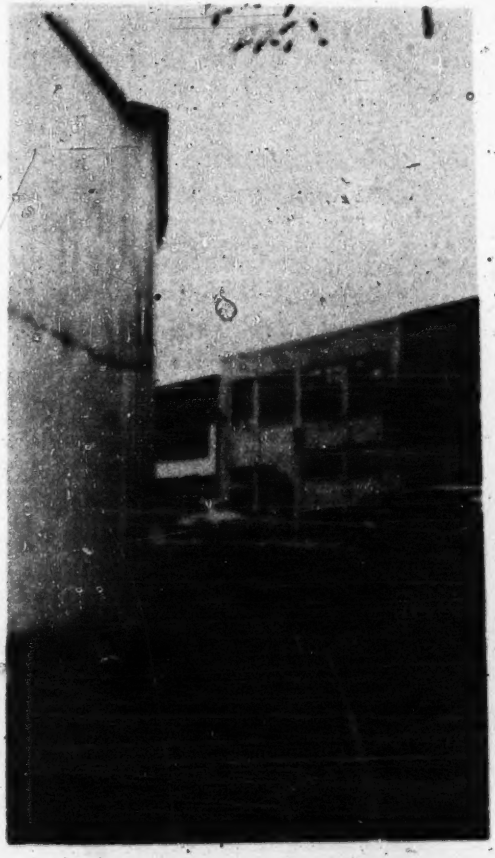
Mr. Tautges: May I show these three exhibits to the Jury, Your Honor?

The Court: Yes.

(Exhibits numbers 2, 3, and 4 are handed to the Jury by Mr. Tautges for their inspection).

(Here follows 1 photolithograph, side folio 98a)

Plaintiff's Exhibit No. 4



[fol. 99] 414 Q. Now Mr. Ellis, before you were struck by that car, did you receive any warning of any kind from the engineer?

A. No.

415 Q. Had you received any warning, notice, or instructions of any kind, either from the engineer of the crew or any other member of it, before you were injured, as to the clearance there was between the easterly rail of the spur track and the building?

A. No, I had not.

416 Q. Had you received any notice, instructions or warning from anyone as to the degree of curvature there was in that Casein Spur track as it rounded the corner of the Casein Building?

A. No.

417 Q. At the time of the accident for what length of time had you been a switch foreman at that time?

A. About a month.

418 Q. Before the date of the accident had you worked as a switch foreman on any other industrial tracks?

[fol. 100] A. Before the accident?

419 Q. Yes.

A. Yes, I worked the 10:30 shift at Boeing's Marginal Way tracks.

420 Q. When was that?

A. That was the first job I had as a foreman, a regular job.

421 Q. How long did you work there?

A. I worked there about,—well, I was foreman on that job up until the day before I got hurt.

422 Q. Well before you got hurt had you been in on the so-called King County tracks or leads in the capacity of a foreman?

A. Yes.

423 Q. The day you got hurt, was that the first time you had worked as a foreman on the Myrtle Street Spur?

A. Yes.

424 Q. And the first time you had ever been in on the Casein Spur track?

A. Yes.

425 Q. Had any of your superiors, either Mr. Ross or any other superior, ever warned you or instructed you as to the

situation and condition on the Casein Spur track as to clearance?

A. No.

426 Q. What wages were you earning while working for the Union Pacific Railroad Company?

A. Well, it varied. For an eight hour day it was $8.34.

427 Q. And then if you worked more than eight hours, was there any change in the pay rate?

A. Yes, time and a half for over-time.

428 Q. When you worked as a switch foreman was your rate of pay higher then when you worked as just a switchman?

[fol. 101] A. Yes.

429 Q. What is the difference?

A. I believe it is fifty-two cents a day.

430 Q. More?

A. Yes.

431 Q. Can you tell the Court and Jury what you earned on the Union Pacific Railroad in your work during the month of January, 1943?

A. About $360.00.

432 Q. What did you earn in February?

A. Approximately $250.00.

433 Q. What was the reason for the difference between January and February?

A. I laid off several days in February, and I never worked so much over-time in February, and February is a short month.

434 Q. What did you lay off for in February?

A. I had some work to do at my home.

435 Q. What kind of work was that?

A. Oh, I was remodeling. Carpenter work; fixing up some plumbing. We had had a hard freese and the plumbing broke. I had to fix the plumbing.

436 Q. Do you remember approximately how long a time you laid off in February?

A. Well, I don't remember, but I think it was about four days.

437 Q. What did you earn in the first half of March?

A. About $125.00.

438 Q. Since March 15th have you done any work?

A. No.

439 Q. Since March 15, 1943, have you felt able or capable of doing any work that you were accustomed to doing?

[fol. 102] A. No, I haven't.

440 Q. Since you were injured have you taken any treatments of any kind other than what you have already testified to?

A. Yes, I have taken physio-therapy.

441 Q. Will you tell the Court what that consists of?

A. Physio-therapy or diathermy is heat treatment and exercise and massage and manipulation.

442 Q. When did you first start taking those treatments?

A. It was about the middle of December.

443 Q. Where have you been taking those?

A. I have been taking them at the Western Clinic, in Tacoma.

444 Q. How frequently do you take those treatments?

A. Twice a week.

445 Q. What does it cost for a treatment of that kind?

A. I believe it is $2.00.

446 Q. You say you take those at Tacoma?

A. Yes.

447 Q. Then in order to take those treatments you have to go from your home in Port Orchard, to Tacoma, Washington?

A. Yes.

448 Q. About what is that distance?

A. About thirty miles.

449 Q. Do you have some expense in making those trips?

A. Yes.

450 Q. What does that amount to?

A. They raised the rates just before I left. It was $1.53, but I believe it is $1.82 now. I am not sure about that.

451 Q. Is that the round trip, from Port Orchard to Tacoma and back?

A. Yes.

[fol. 103] Mr. Tautges: I think you may cross examine.

Cross examination.

By Mr. Robert Hamer:

452 Q. Who are your doctors in the Western Clinic?

A. I beg your pardon.

453 Q. Who are your physicians or doctors at the Western Clinic?

A. Dr. Curran and Dr. Yoder.

454 Q. Are you still under Dr. Yoder's treatment?

A. Well I was, yes, until I left.

455 Q. Do you expect to resume them when you go back?

A. Yes.

456 Q. Have you received some benefits from these physiotherapy treatments you have received at the Western Clinic in Tacoma?

A. Yes.

457 Q. Are you able to move your arm much more freely now than you were when you first started taking those treatments?

A. Yes, some.

458 Q. When did you first notice that you were receiving some benefit or improvement in your condition after you started taking treatments?

A. Well, it would be just a guess. I would say a month.

459 Q. That would be along about the middle of January, 1944?

A. Yes.

460 Q. You have been taking the treatments regularly have you, twice a week, up until the time you left your home to come back here for the trial of this case?

A. Yes. No, the last two weeks they told me to come back once a week.

[fol. 104] 461 Q. So you are taking them once a week now?

A. Yes.

462 Q. Was it Dr. Yoder who suggested that to you?

A. Yes.

463 Q. He is the physician who has been in charge of your case since you first saw him in January, isn't he?

A. Yes.

464 Q. As I understand you, Mr. Ellis, Exhibits numbers 2, 3 and 4 were all taken on the same day.

A. Yes.

465 Q. And you took one of those pictures, did you?

A. Yes, I took this one, (indicating).

466 Q. That is Exhibit number 2?

A. Yes.

467 Q. And you say Mr. Burns took the picture identified as Exhibit number 3, that shows you in the picture?

A. Yes.

468 Q. Do you remember who took Exhibit number 4?

A. I believe Mr. Burns did. It was his camera.

469 Q. I notice it is a little wider than the other pictures.

A. Yes.

470 Q. Had you changed your position any from the time that Exhibit number 3 was taken until Exhibit number 4 was taken?

A. Yes.

471 Q. How did you change your position?

A. I was out by him.

472 Q. You were standing by Mr. Burns at the time Exhibit number 4 was taken?

[fol. 105] A. Yes.

473 Q. This Mr. Burns you have mentioned, is that John B. Burns?

A. Yes, I guess that is his name. It is J. B.

474 Q. Where does he live?

A. He lives in Tacoma.

475 Q. Is that the same man who was with Mr. Tautges at Port Orchard the day I saw you there?

A. Yes, I believe he was there.

476 Q. That is the same J. B. Burns, is it?

A. Yes, that is right.

477 Q. As I recall, Mr. Ellis, you testified that on the day you were hurt it was not raining. Isn't that right?

A. No, I don't think it was.

478 Q. What sort of a day was it?

A. Well, really I don't know.

479 Q. Do you remember anything at all about what the weather did on that day?

A. No, I don't. I don't believe it had rained though.

480 Q. Do you remember whether it was a clear or a cloudy day?

A. No, I couldn't say.

481 Q. Do you remember what the weather had been the day before you were hurt?

A. No, I don't.

482 Q. Do you remember whether it had rained the day before?

A. No, I can't remember that far back.

483 Q. Do you remember any time that it rained the week before you were hurt?

A. No, I couldn't say what days it rained.

484 Q. Well, do you have any recollection at all that it did rain at any time in the week before you were hurt?

A. No, I can't say that I have.

[fol. 106] 485 Q. Do you have any recollection that it had rained at any time within the two weeks before you were hurt?

A. I couldn't say any day that it rained.

486 Q. Well, could you say whether or not it did rain at any time within the two weeks before you were hurt?

A. Yes, I could say that it did.

487 Q. And upon what do you base that statement?

A. Because that is the rainy season in Washington?

488 Q. But you don't have any recollection at this time that it did in fact rain during that period of two weeks before you got hurt?

A. No, I couldn't say any certain day.

489 Q. Do you have any recollection at all, Mr. Ellis, that the conditions down along the Casein Spur were wet or mucky during the two weeks before you got hurt?

A. No, I do not.

490 Q. When you worked as a brakeman and switchman for the Southern Pacific at Albany, Oregon, were you on road service or yard service at that time?

A. I was in road service.

491 Q. Did you work about the yards?

A. Yes, some.

492 Q. Did you handle the switching of cars in and about the yard there?

A. Yes.

493 Q. And you worked for the Southern Pacific for about a year and a half?

A. I imagine around a year or a year and a half. I am not sure.

494 Q. Well, you know that it was more than a year, don't you?

[fol. 107] A. No, I don't.

495 Q. You don't remember any more?

A. No, I don't.

496 Q. Well, you started to work for the Union Pacific at the Argo yards April 4, 1942, is that right?

A. Well, it was about then. It possibly could be, yes.

497 Q. Well, it was the forepart of the month of April, you recall that?

A. Yes, that is right. I believe the 4th is correct.

498 Q. And at the start you worked on the extra board, did you?

A. Yes.

499 Q. And most of the time you were on the extra board were you working days or nights?

A. Nights.

500 Q. Did you work some day shifts during the time you were on the extra board?

A. Yes.

501 Q. How long were you working on the extra board befor you got a regular assignment?

A. Well, I don't know the date. It would be in the summer of 1942.

502 Q. Well, do you recall about how long it was that you were on the extra board, from the time you started working?

A. Oh, approximately four months.

503 Q. So that you got your first regular assignment then some time in July?

A. Well, I am not sure about that. It was along there some place.

The Court: We will take a short recess, Gentlemen.

[fol. 108] (Following recess Mr. Newton W. Ellis resumed the witness stand for further cross examination by Mr. Robert Hamer).

504 Q. During the time that you were on the extra board, when you first started working, you did on some occasions engage in handling industrial work did you not?

A. Yes, some.

505 Q. And where was the industrial work you engaged in while you were on the extra board?

A. Well, some was down at what is known as the local yard; some was out on the main line and to the Union Depot, and I worked up at Boeing's a time or two.

506 Q. Did you work any other place on industrial tracks during the time you were on the extra board?

A. I don't remember of any other.

507 Q. And some of that was during the day light hours and some at night?

A. Very little daylight.

508 Q. Well, I say some of it?

A. Yes, once or twice.

509 Q. Now don't you recall, Mr. Ellis, that you were only on the extra board a short time, for about three months?

A. Yes, something like that. I am not sure.

510 Q. And when you got a regular assignment, where were your switching duties performed then?

A. In the main yard.

511 Q. In the main Argo yards?

A. Yes.

[fol. 109] 512 Q. How long was it after you got a regular assignment in the main Argo yards that you started on a regular assignment in the industrial district?

A. I don't understand the question.

513 Q. (Read by reporter).

A. I still don't understand it.

514 Q. Well, as I understand your testimony, after you had been on the extra board for a period of about three months you then got your first regular assignment, is that right?

A. Yes.

515 Q. And I understand you now that your first regular assignment was in the main Argo Yards?

A. Yes.

516 Q. Now how long was it after that that you commenced handling switching operations in the industrial district and on industry tracks? When did you and the other members of the crew start handling movements on the industrial tracks?

A. Oh, I had a two-thirty job. That was a midnight job in the yard. I went to work at midnight. The next job I had was industrial. I went to work at 2:30 in the afternoon.

517 Q. Do you remember about when that was,—what month?

A. No, I couldn't say.

518 Q. It was during the summer of 1942, was it?

A. It was in the fall probably, along in the fall of 1942.

519 Q. Do you have any way at all, Mr. Ellis, of fixing any more definitely for the benefit of the Jury when it was that you had your industrial assignment, working on the 2:30 in the afternoon shift?

A. Well, I don't remember the date, no. Let's say in September.

[fol. 110] 520 Q. Now after you started, whenever the time

was, in doing work on industry tracks, or doing industrial work your employment from that time on until the day you were hurt was largely work on industry tracks, was it not?

A. No, it wasn't.

521 Q. How long did you engage in work on industry tracks that you say you think commenced in September of 1942?

A. I would say about a month.

522 Q. Then where did you go after that?

A. I went back to the main yard.

523 Q. When did you next start working and handling industrial work then?

A. The day before I got hurt.

524 Q. That would have been the 14th of March, 1943?

A. Yes.

525 Q. When you did that industrial work on the 2:30 shift in the afternoon, did you have occasion to be down on the Myrtle Street track?

A. No.

526 Q. You never went down on the Myrtle Street track at all?

A. Yes, probably so. I was working in King County tracks and you have to go on Myrtle Street if you are shipping at Middleton Lumber Yard, — your engine will go down Myrtle Street.

527 Q. Were you ever down on the Myrtle Street track in connection with the movement of cars that were going in on the Casein Spur track?

A. No.

528 Q. Your testimony is then that up until the 15th day of March, 1943, the day that you got hurt, you had never been down in the vicinity of the switch that you have marked Switch "E" on this plat, Exhibit number 1?

[fol. 111] A. No, I didn't say that. That isn't the Casein switch. I probably have been down there. The engine would go around that curve there.

529 Q. Had you ever been down to the Casein switch at any time up until March 15, 1943?

A. No.

530 Q. Never on any occasion?

A. Not that I remember of, no.

531 Q. Neither as a helper nor as a foreman?

A. Not that I know of.

532 Q. Well, is your recollection pretty clear on that?

A. Yes.

533 Q. If you had been there do you think you would recall it?

A. Yes, I imagine I would.

534 Q. During the time you were on the extra board I assume that you worked as a helper?

A. Yes.

535 Q. In what positions did you work as a helper during the time you were on the extra board?

A. As a field man or a head man.

536 Q. It had to be one or the other?

A. Yes.

537 Q. And when you got a regular assignment in what positions did you work?

A. One or the other.

538 Q. Either as field man or head man?

A. Yes.

539 Q. You worked in both positions, did you?

[fol. 112] A. Yes.

540 Q. And you think you spent about as much time being head man as you did being field man?

A. Yes, I imagine so.

541 Q. In other words, you divided pretty much the discharge of your duties as a field man and a head man?

A. Yes.

542 Q. Now is the head man sometimes referred to as the "pinner", or "pin-puller"?

A. Yes, "pin-puller".

543 Q. What are his duties, generally?

A. Well, he follows the engine and he cuts off the cars when they are kicking them.

544 Q. What does he do with respect to throwing switches, if anything?

A. Well, if they have a light engine, it is his duty to throw the switch.

545 Q. What, generally speaking, are the duties of the field man?

A. Well, he goes with the foreman and makes the cuts in the cars and throws the field switches.

546 Q. Does he also make spots of cars?

A. Yes.

547 Q. Also a part of his duty is in connection with going in on an industrial spur to pull out a car and to make the coupling?

A. Which one?

548 Q. The field man.

A. He would make the coupling, yes.

549 Q. And then if cars were being taken in on industry tracks, is it the duty of the field men to go back to the loading platform, or where the cars are to be spotted, for the purpose of passing signals to the engineer to properly spot the car?

[fol. 113] Yes, him or the foreman.

550 Q. What is the duty of the engine foreman?

A. Well, he gets instructions to the crew and will tell the field man what cars he is going to pick up and what he is going to do with the cars, and the head man usually works by signals from the foreman.

551 Q. Is the foreman the man who is in charge of all of the crew?

A. Yes.

552 Q. Including the engineer and fireman?

A. That is right.

553 Q. And they make the movements in accordance with the signals that the foreman gives, or the directions the foreman gives to the other members of the crew?

A. Yes.

554 Q. Now the Casein Company, the Continental Can Company and Tyee Lumber Company shown on the plat, Exhibit number 1, are industries located on what are referred to as the King County tracks, are they not?

A. No, they are not. The King County tracks are about a block north of the Tyee Lumber Company yard.

555 Q. Well, have you ever heard any of the men refer to this Myrtle Street track as being the King County lead?

A. No, I haven't.

556 Q. You haven't ever heard that?

A. No.

557 Q. During the approximate period of one year that you worked for the Union Pacific you had engaged generally, had you not, in conducting switching operations throughout the industrial zone in which the Union Pacific handled the switching?

[fol. 114] A. No.

558 Q. Do you recall, Mr. Ellis, that your deposition was taken in this case at Port Orchard, Washington, on March 6, 1944?

A. Yes.

559 Q. You had been subpoena-d several days before that, had you not?

A. Yes.

560 Q. And you came over to the court house at Port Orchard at the time your deposition was to be taken, with your attorney, Mr. Tautges?

A. Yes.

561 Q. And before you were questioned, you were sworn to testify the truth, the whole truth and nothing but the truth?

A. Yes.

562 Q. And you took the same oath before your deposition was taken that you took before you became a witness in this trial?

A. Yes.

563 Q. Let me ask you if at the time your deposition was taken you were not asked this question and made this answer.

Mr. Tautges: On what page is that?

Mr. Hamer: Page 11, Line 18.

Question; "During the approximately a year that you were there, did you have occasion to engage in switching operations and train movements throughout that zone?" Answer; "Which zone is that?" Question; "The one the Union Pacific does the switching in?" Answer; "Oh, yes." Did you so testify?

A. Yes.

564 Q. Let me ask you if following that this question was asked. Question; "My question is really, whether or not your switching experience was confined to just a certain part of the yard, or whether you engaged in switching throughout the zone." Answer; "Throughout the zone." [fol. 115] Did you so testify?

A. Yes.

565 Q. Well then, it is a fact isn't it Mr. Ellis, that during the year, approximately, that you worked for the Union Pacific you did engage in switching operations generally throughout the industrial district where Union Pacific handles the switching.

A. Well what do you mean by generally?

566 Q. Well, you had been in all parts of it.

A. Yes. What I meant was that I worked mostly in the Argo Yard. I didn't work in the industrial districts very much.

567 Q. Now Mr. Ellis, getting back to the time when you first engaged in handling switching in the industrial district, don't you recall that at the time your deposition was taken you testified that you went in there in the summer of 1942?

A. Went in where?

568 Q. On the King County tracks.

A. Yes.

569 Q. And on the track that serves the Casein Company?

A. Yes, I said I was on that track, the Myrtle Street track.

570 Q. That was, then, in the summer of 1942 rather than in September?

A. No, I don't mean that. I couldn't say what date it was.

571 Q. Well, it was the same time you were on the 2:30 in the afternoon shift, do you remember that?

A. Yes, we worked in King County on that shift.

572 Q. Who did you work with when you started out on the 2:30 afternoon shift?

[fol. 116] A. Well, I don't remember now.

573 Q. Don't you remember anybody on the crew you worked with during that month?

A. I remember a fellow by the name of Murphy, yes.

574 Q. Who was he?

A. He was the foreman.

575 Q. Do you recall anybody else?

A. Well, they don't stay on one job very long. There would probably be three or four different men, — I would say two or three foremen.

576 Q. Did you ever work with a foreman named Olsen during the time you were on the 2:30 shift?

A. Not that I remember of.

577 Q. Do you remember whether you worked with Olsen as a helper during the time you were on that shift?

A. Olsen was not the foreman.

578 Q. Do you remember whether or not you worked with him as a helper during the time you were on the 2:30 shift?

A. Yes, I believe I did.

579 Q. Do you remember whether during the time you were on the 2:30 shift you worked with a foreman by the name of Monroe?

A. Yes.

580 Q. Do you recall any time when Mr. Olsen was acting as foreman during the time you were on his crew and when you were on the 2:30 shift?

A. No, I don't.

581 Q. Had you ever acted as a foreman before you were promoted to foreman in February, 1943?

A. Yes.

[fol. 117] 582 Q. Do you remember when you first started serving as an acting foreman?

A. No, I don't.

583 Q. Do you recall whether it was in the summer of 1942?

A. Yes, some time in the summer.

584 Q. How frequently did you act as a foreman?

A. Not very often.

585 Q. Well, can you give us some idea of whether it was once a week or once a month, whatever it was?

A. Well, during the first summer, probably once in two weeks, or something like that.

586 Q. Well, during the fall of 1942 did you act as foreman more often?

A. Yes.

587 Q. You had served as an acting foreman for a period of several weeks, that is, at different times, before you were promoted to foreman, is that right?

A. Yes, some days I would be foreman.

588 Q. Does a foreman have any duties in connection with making or keeping any notes?

A. Yes.

589 Q. What sort of notes are those?

A. Well, it is just the time slip is about all.

590 Q. What other records?

A. The time you go to work, when you quit, and if you are on industrial work you make an industrial sheet.

591 Q. What do you put on the industrial sheet?

A. The box cars you are handling.

592 Q. Where they went?

[fol. 118] A. Yes.

593 Q. Where they came from?

A. Yes.

594 Q. And the time they were either picked up or set in?

A. That is right.

595 Q. Did you make out such records yourself during the time you were employed, before you got hurt?

A. Yes, I had.

596 Q. You recall don't you, Mr. Ellis, that at the time your deposition was taken you were asked with respect to the number of times that you had been down over the Myrtle Street track in connection with movements that were being made into the Casein Company's spur?

A. I don't remember.

597 Q. Well, let me ask you if at the time your deposition was taken these questions were asked you and whether you made these answers.

Mr. Tautges: On what page is that?

Mr. Hamer: Starting on page 16, line 18. Question; "What did you call the track that lies along the north side of Myrtle Street? Is that a lead track?" Answer; "No, that would not be a lead track." Did you so testify?

A. Yes.

598 Q. Then do you recall that we had some discussion off the record with respect to what you called the track, as to whether you called it a lead track or a spur track, or whatever you called it?

A. Yes, I believe we did.

[fol. 119] 599 Q. Let me ask if following that you were asked these questions and if you made these answers. Question; "All right, so that we know that we are talking about the same thing, you call it a spur, and suppose we refer to that particular track as the Myrtle Street spur. Is it correct for me to say that the spur that leads onto the Casein track comes off the Myrtle Street spur?" Answer; "Yes, that is the way I would describe it." Question; "How frequently, when you were on this assignment in the summer of 1942, did you have occasion to be up and down the Myrtle Street spur?" Answer; "Well, that is pretty hard to say. I would have to guess at that." Question; "Give us your best judgment about it." Answer; "I would say four times, or something like that." Question; "Do you mean by that four different days, or four times on any one day?" Answer; "Four different occasions". Question; "The office of the Casein Company faces on Myrtle Street,

does it not?" Answer; "Yes, I believe it does." Did you so testify?

A. Yes, sir.

600 Q. Continuing, let me ask you if these questions were asked and if you made these answers. Question; "During the time that you were on that shift, didn't you frequently pass by one way or another on this Myrtle Street spur?" Answer; "We had to get in there." Question; "And when you say that you went in about four times, do you mean you went in on the Casein spur about four times?" Answer; "No, I didn't go in." Did you so testify?

A. Yes, sir.

601 Q. Now, continuing: "Question; "Well, I mean movements that you—", and you interrupted and said, "The train did, yes." Did you so testify?

[fol. 120] A. Yes, sir.

602 Q. Question; "The movements with the train did?" Answer; "Yes". Question; "That would be in the summer of 1942?" Answer; "Yes." Question; "Now then, without regard to the number of movements that the crew of which you were a part made into the Casein Spur, how many other occasions can you tell us, or how many times per day, when you were working in that part of the yard, would you have occasion to be on trains of cars that were being operated on this Myrtle Street Spur?" Answer; "I wouldn't have any?" Did you so testify?

A. Yes, sir.

603 Q. Question; "You wouldn't have any?" Answer; "No." Question; "Doesn't this Myrtle Street Spur serve some industries other than the Casein Company?" Answer; "Not that I know of. Oh, I believe that it does too. I believe that they set oil tanks in there on that Myrtle Street Spur at times too. But we never did." Did you so testify?

A. Yes, sir.

604 Q. Question; "Doesn't that spur also serve some lumber yards located over on the other side of the street, and beyond?" Answer; "No." Did you so testify?

A. Yes.

605 Q. Let me ask you, following that if these questions were asked and if you made these answers: Question; "Now Mr. Ellis, I am distinguishing between the Myrtle Street Spur and the Casein Spur." Answer; "Yes". Ques-

tion; "And I do not know whether I have made that clear to you or not, but I have been under the impression that the Myrtle Street Spur is really a lead track from which there are a number of spur tracks that go off to serve other industries. Am I mistaken?" Answer; "You are mistaken. There is only one spur track goes off that Myrtle Street Spur." [fol. 121] Question; "So that every time you had occasion to be on the track that we refer to here as the Myrtle Street Spur, it was in connection with either pick-up or delivery of some cars to the Casein Company?" Answer; "Yes". Did you so testify?

A. Yes, no doubt.

606 Q. When you first went to Port Orchard you were engaged in the dairy business, weren't you?

A. Yes.

607 Q. And you operated a dairy for a period of about two or three years at Port Orchard?

A. Yes, sir.

608 Q. You had had previous experience in the dairy business had you when you had lived in Sequim, Washington?

A. Yes, sir.

609 Q. How long had you been engaged in that business at Sequim?

A. About a year.

610 Q. And then it was after you had been in the dairy business at Port Orchard that you took up plastering, was it?

A. No.

611 Q. You had done that before you had been in the dairy business?

A. Yes.

612 Q. You had also had experience with your father as a general contractor, hadn't you?

A. No, just building, not contracting. We never did any contracting.

613 Q. Well, the construction of houses for the purpose of selling them?

A. Yes.

[fol. 122] 614 Q. That involved, of course, all phases of construction as far as dwellings were concerned?

A. Well, a contractor, — like if you wanted a house built and I happened to be the lowest bidder and you looked at my work and if it was satisfactory you would more than

likely let me have the job of building it. We never worked that way.

615 Q. Well, you worked with your father, building houses to sell and that involved all phases of the construction of dwellings. That is right isn't it?

A. Yes.

616 Q. Now Mr. Ellis, on the day of your accident, as I understand it, your first job after you went to work on the four o'clock shift was some work you had down at the Boeing plant. That is right isn't it?

A. Yes.

617 Q. Your recollection is that you went down there and picked up some loaded cars from the industry tracks that serve the Boeing plant?

A. No, we took some cars down there.

618 Q. You took some down there?

A. Yes, sir, we took some cars down to the Boeing plant.

619 Q. Did you bring any cars back with you?

A. Yes.

620 Q. Where did you bring them to?

A. We brought them to the Marginal Way.

621 Q. And set them out there on the passing track?

A. Yes.

622 Q. Then you left the passing track on Marginal Way with a light engine, did you?

A. Yes.

[fol. 123] 623 Q. You didn't handle any other switching movements after you set out those cars until the engine got east of the Casein Spur switch, is that right?

A. We didn't handle any cars until we got east of there.

624 Q. Or until you got in on the Casein Spur track?

A. No, we didn't.

625 Q. Where were you riding when you left the passing track on Marginal Way?

A. On the engine some place, most likely it would be the rear footboard. That is our usual place of riding.

626 Q. Did you ever ride in the cab or gangway of the switch engine?

A. Yes.

627 Q. Do you remember on this occasion after you left Marginal Way whether you were riding on the footboard, or were you up in the gangway of the engine?

A. No, I don't.

628 Q. Do you remember any time after you left there, some place where you were riding on the engine?

A. No.

629 Q. Do you have any distinct or definite recollection at this time at all of the place where you were riding when the engine got down here on the Myrtle Street track in front of the Casein Building?

A. No, not distinctly, no.

630 Q. You wouldn't say one way or the other, whether at the time the engine got down here you were riding up in the engine, on the gangway, or whether you were riding on the footboard?

A. I imagine it would be on the footboard.

[fol. 124] 631 Q. But you don't recall?

A. No, I do not.

632 Q. Now the switch you have referred to on this plat and marked "Switch E", that switch was always lined for the Myrtle Street track, wasn't it?

A. I don't know.

633 Q. Do you recall whether on this occasion, as you came in, it was lined for the Myrtle Street track?

A. I don't know whether it was or not, but I imagine it was.

634 Q. Why do you say that?

A. Well, it should be.

635 Q. You don't have any recollection of the engine stopping for anybody to get out and line the switch, do you?

A. No.

636 Q. Where was the first place that you recall at all, Mr. Ellis, of the engine coming to a stop after coming in on the Myrtle Street track that afternoon?

A. I don't know when it did first come to a stop.

637 Q. Don't you recall that the engine did not come to a stop until it had proceeded east beyond the switching point?

A. No, I don't know whether it did nor not.

638 Q. Of course it was necessary for the engine to come to a stop there was it not?

A. To stop where?

639 Q. East of the Casein Spur switch?

A. Yes, it was.

640 Q. Of course if it hadn't stopped there it never could have backed into the Casein Spur, that is right isn't it?

A. That is right.

[fol. 125] 641 Q. There wouldn't have been any purpose in bringing the engine to a stop until the engine had proceeded to the east of the switch, would there?

A. Yes.

642 Q. For what purpose?

A. To look at the cars to see if we should go any farther in after them.

643 Q. But you don't have any recollection that the engine did stop?

A. No, I couldn't say that it did.

644 Q. The only recollection you have of the place where the engine came to a stop was some point east of the Casein switch, is that right?

A. That is where it would have to stop. I don't remember whether it stopped there or not.

645 Q. Don't you now recall, Mr. Ellis, that you were on the engine until the engine came to a stop east of the Casein Spur switch?

A. No, I was not.

646 Q. Let me ask you, Mr. Ellis, if at the time your deposition was taken, these questions were asked and if you made these answers; starting on Page 28, line 23. Question; "You were going in with a light engine on the Myrtle Street tracks, and headed east, that is right?" Answer; "Yes". Question; "What did you do then, or what did you and the crew do?" Answer; "We had to go over a switch". Question; "That is, you mean you had to go east beyond the switching point?" Answer; "Yes, east beyond the switch". Did you so testify?

A. Yes, the engine would have to do that.

[fol. 126] 647 Q. Then continuing; Question; "Where were you at that time, as the engine went beyond the switch?" Answer; "I imagine I was on the engine. I don't remember whether I was right on it." Did you so testify?

A. Yes, but I remember—(interrupted).

648 Q. All right, you have answered the question. Then let me ask you if you were asked this question and if you made this answer. Question; "And that would necessarily put you out somewhere east and north of the Casein Spur, would it?" Answer; "Yes". Did you so testify?

A. Yes, but I remember now that I didn't do that. It wouldn't be practical for the foreman to ride out there. It wouldn't be his work to go out there in the first place.

Mr. Hamer: I move that that last statement be stricken as not responsive to the question and purely a voluntary statement.

The Court: Yes, it was a voluntary statement. It may go out.

Plaintiff excepts.

649 Q. Now this line that you have drawn on this plat, Exhibit number 1, Mr. Ellis, it starts with the letter "A" and is a broken line ending with the letter "B", which appears on the plat, as I understand it, it was your testimony on direct examination that that line represents substantially the path that you followed the first time you went back on the Casein Spur track. Come up where you can see.

A. (Witness steps to the plat, exhibit number 1, which is on an easel before the Jury). Yes, that is approximately the way I went.

[fol. 127] 650 Q. Well, could you fix it any more definitely at this time than at the time Mr. Tautges was asking you about it?

A. That would be the logical place to go, from here to here, (indicating).

651 Q. All right. Now then, was your testimony that you followed that path based upon your reasoning it out that it was the logical way to do it, or was it based upon any recollection that you have?

A. Based upon my recollection that that is the way I would do it.

652 Q. That that is the way you would do it, or the way you did do it?

A. That is the way I did do it.

653 Q. Of course ever since the time you walked back along the track toward the Casein Spur to determine which car was the car to come out, you have known which way you walked, haven't you?

A. Yes.

654 Q. Now you may take the stand again.

A. (The witness resumes the witness stand).

655 Q. Do you remember at the time your deposition was taken that these questions were asked you and did you make these answers?

Mr. Tautges: What page?

Mr. Hamer: Well, I will start on page 30, line 22.

656 Q. (continued) Question; "Well, when you looked over on the Casein Spur, what did you see over there?" Answer; "I saw two cars. I had to get the back one." Question; "How did you know that the one you wanted was the rear one?" Answer; "By the number." Question; [fol. 128] "How did you read that? Was it light enough to read it?" Answer; "I went back and looked at it." Question; "Did you need any artificial light?" Answer; "No". Did you so testify?

A. Yes.

657 Q. Let me ask if immediately following that this question was asked and if you made this answer; Question; "Which way did you go back? Do you recall which side of the spur you walked back on?" Answer; "No, I do not". Question; "Did you walk next to the building, or on the other side of the track?" Answer; "Well, I imagine it would be on the other side of the track." Question; "You do not remember that?" Answer; "No". Did you so testify?

A. Yes.

658 Q. After you did ascertain that the car that was to be taken out was the second car on the spur, or the most southerly car, you don't recall whether you were standing on the west side of the track or between the building and the track, do you?

A. No, I don't.

659 Q. You don't recall on which side of the car the tag was that gave you the information that you were seeking?

A. Well, I imagine, — (interrupted).

660 Q. No, do you recall?

A. No, I don't.

661 Q. Were there at the time that you walked in along the spur to determine which of the cars was the car to be taken out, any automobiles parked along here between the track and Seventh Avenue?

A. I walked along the spur, — how do you mean?

[fol. 129] 662 Q. Well, in this area where I am pointing with a pencil.

A. I don't know whether there was or not.

663 Q. As far as you recall it was all clear space was it

between the track and the paving that is shown here on this plat as Seventh Avenue?

A. There could have been cars parked in here, (indicating).

664 Q. But you don't recall that there was?

A. No, I don't.

665 Q. As far as your recollection is concerned, there may have been no cars in there at all.

A. No, and there may have been a dozen.

666 Q. There may have been a dozen? You just don't remember one way or the other.

A. That is right.

The Court: We will adjourn until 1:30 this afternoon, Gentlemen.

(Court reconvened at 1:30 P. M., May 9, 1944, pursuant to adjournment, and hearing of the above entitled cause was resumed as follows).

Mr. Hamer: We are not through with the cross examination of the Plaintiff, but Mr. Tautges inquired whether or not we would be willing to accommodate him by allowing him to put on a doctor that he has called, out of order, and as I understand it, prior to the time the doctor testified, Mr. Tautges wants to offer in evident the deposition of another doctor, taken in Minneapolis, which doctor took and identified all the X-rays.

Mr. Tautges: Yes, at this time we would like to offer in evidence the deposition of Dr. Walter H. Ude, taken in Minneapolis, Minnesota on the 19th day of April, 1944, at 10:00 o'clock A. M., before Paul M. Ness, Notary Public.

[fol. 130] The Court: Yes, you may read the deposition.

(The deposition of Dr. Walter H. Ude omitted by stipulation).

Mr. Newton W. Ellis, recalled by Mr. Robert Hamer for further cross examination, having been previously sworn, testified as follows on his own behalf as plaintiff.

Cross examination.

Continued by Mr. Robert Hamer:

883 Q. As I recall, Mr. Ellis, you had been on this four o'clock shift, the one you were on the day of the accident, for just a day or two before?

A. That was my second day on that job.

884 Q. Now I assume that the four o'clock starting time for your time on the railroad was also four o'clock generally in the City of Seattle, wasn't it?

A. Yes.

885 Q. The railroad operated on the same time that the banks and other places of business in the City of Seattle operated on?

A. As far as I know.

886 Q. And of course on March 15, 1943, and for about a year before that you were operating on Pacific war time out at Seattle, weren't you?

A. I couldn't say.

887 Q. Daylight saving time or Pacific war time. Do you remember when the change was made?

A. No, I don't remember.

[fol. 131] 888 Q. Well, everybody out there turned their clocks an hour ahead, the same as they did all over the country, didn't they?

A. I suppose they did.

889 Q. The sun was still up wasn't it, at the time you got down there with the light engine?

A. I don't recall. I don't think so.

890 Q. Do you know the time that the sun set in Seattle on March 15, 1943?

A. No, I don't.

891 Q. Have you ever taken any pains to check that with the weather bureau?

A. No.

892 Q. Well, I take it then that you don't know whether the sun had set or whether it hadn't set at the time you arrived there?

A. No, I couldn't say.

893 Q. When you first went back along the spur track to determine which one of the two cars that were then on the track was to go out, did anyone go with you?

A. I never went back along the spur track.

894 Q. Well, when you went back to see about the cars, wherever you went, you were walking on one side or the other of the spur track weren't you?

A. I was walking on the west side.

895 Q. Well, that was along the track wasn't it, — at least part of it?

A. No, along the pavement there.

896 Q. Along the pavement?

A. Yes, sir.

[fol. 132] 897 Q. Did anyone go with you?

A. I don't remember.

898 Q. Well do you remember when you got back there, was anybody else in your crew there?

A. I imagine Brown was there, yes.

899 Q. Well do you remember whether Brown went back with you or whether you got there ahead of him?

A. No, I don't.

900 Q. You don't remember whether you got there first or he got there first?

A. No.

901 Q. You do recall that you saw Brown there?

A. I said I imagined he would be there. I don't recall seeing him.

902 Q. Why do you imagine that Brown would be there?

A. Because that was his place to work.

903 Q. He being the field man?

A. Yes.

904 Q. And it was the duty of the field man to go back there and make the coupling, is that right?

A. That is right.

905 Q. Do you know where Field was?

A. He was with the engine.

906 Q. What was he doing up there, or what did he have to do?

A. Well, he was supposed to follow the engine and throw the switch to let it back in to get the cars.

[fol. 133] 907 Q. Is that part of the duty of the head man or the pin puller?

A. Yes.

908 Q. Is that the way that the work would be divided between the two helpers going into any industry track or any industry spur?

A. You mean the head man following the engine?

909 Q. And the field man going back along the track to couple on to the cars?

A. Yes.

910 Q. That is the way that it had been done on industry tracks during the time you had served as a field man and as a head man?

A. That is the normal procedure.

911 Q. Now did you get back to the cars before the engine started in on the spur.

A. Yes.

912 Q. Did the engine make any move at all until after you had ascertained which of the two cars was to go out and gave the signals to the other members of the crew?

A. I don't know.

913 Q. You mean you don't remember one way or the other about that?

A. I don't remember one way or the other.

914 Q. You do remember don't you that you were the one who did give the signal for the engine to come back in? Do you recall that?

A. Most likely I did.

915 Q. And you give that signal by a motion with your hand?

A. Yes.

916 Q. Where were the men at that time to whom you were giving the signals?

A. On the engine, if I gave the signal.

917 Q. And where was the engine at that time?

[fol. 134] A. Well, I couldn't say where.

918 Q. Well, it hadn't started in on to the spur yet had it?

A. No.

919 Q. Where did you go to pass that signal?

A. I would have to step out in sight.

920 Q. Which way?

A. Well, that would be west.

921 Q. You say those signals were given by you from the west side of the track, the side away from the building, is that right?

A. As near as I can remember.

922 Q. Now after you had passed those signals the engine then proceeded to back in on the Casein Spur, did it?

A. It proceeded to head over the switch.

923 Q. Well where was the engine at the time you gave the signal?

A. It was between the two switches, — some place between those two switches.

924 Q. You testified this morning didn't you Mr. Ellis that the only recollection you have of that engine coming to

a stop at any place was after the engine had gone beyond, or east of the Casein Spur switch?

A. I said I didn't remember where it stopped.

925 Q. Well, I thought you testified this morning that your only recollection of where the engine came to a stop was at a point east of the Casein Spur switch. Now isn't that right?

A. No, that is wrong.

926 Q. Didn't you so testify?

A. No.

[fol. 135] 927 Q. The first time that you ever were back along the first or second loading dock on the west side of the Casein Building was the time that you found one car at the first loading platform and the second car spotted at the second loading platform, is that right?

A. That is right.

928 Q. And when the engine backed in to the Casein Spur it was necessary, first to couple on to the first car spotted at the first loading dock was it?

A. Yes.

929 Q. And then to push that car back and couple on to the second car that was at the second loading dock. That is right isn't it?

A. Yes.

930 Q. And were you in the vicinity of those two cars at the time those couplings were being made?

A. Yes.

931 Q. Did Brown, the field man, make those couplings?

A. I don't know. Most likely he did.

932 Q. Would there be anybody else there to make the couplings except you and Brown?

A. That would be the usual way, yes.

933 Q. Was there anyone else there on that occasion who could have made the couplings, except you or Brown?

A. I don't remember of anyone else, no.

934 Q. Well, is it right then that either Brown or you made the couplings?

A. That is right.

[fol. 136] 935 Q. Do you remember on which side you were working at the time those couplings were being made?

A. On the east side.

936 Q. That would be in between the track and the building?

A. Yes.

937 Q. And in the vicinity of those loading docks?

A. Yes.

938 Q. After the couplings were made were there some signals passed then to the engineer to proceed ahead and out of the spur?

A. Yes.

939 Q. Do you remember who passed those signals?

A. No, I don't.

940 Q. Whose duty would that be?

A. Either one of us.

941 Q. Either you or Brown, the field man?

A. Yes.

942 Q. And you don't recall now whether it was you who gave the signal, or Brown?

A. No.

943 Q. Do you recall on which side of the track those signals were given?

A. They were given on the east side.

944 Q. Do you have any definite recollection of that?

A. No.

945 Q. You say they were given on the east side because it was customary to pass them on the east side, is that correct?

A. That is right.

946 Q. Where was the tag located that told you which was the car to go out?

[fol. 137] A. On the back box car.

947 Q. Where on it?

A. On the side.

948 Q. But do you recall on which side?

A. Well, it would most likely be on the east side.

949 Q. Was that where it was customary to find the tag?

A. I don't know.

950 Q. Why would you expect it to be most likely to be on the east side?

A. That is where the platform is.

951 Q. Had you observed tags on the east side at that platform before?

A. No, I hadn't.

952 Q. Had you ever given any signals on the east side in the vicinity of those platforms before?

A. No.

953 Q. After the signals were given, whether by you or whether by Brown, I assume the engineer acted upon the signal and started out with the two cars?

A. Yes.

954 Q. Now did you ride either of the two cars out?

A. No.

955 Q. Did you wait there until the movement started before you started to walk out?

A. I waited until the cars were past me, and walked out.

956 Q. You waited until the cars were past you and then walked out?

A. Yes.

957 Q. And were the cars always ahead of you while you were walking out?

A. No.

958 Q. Did you catch up with them?

[fol. 138] A. No, they went over toward the east and I walked right straight north.

959 Q. Well I mean, you started out I assume as the cars did. Were you somewhere behind the end of the second car when you started to walk away?

A. Yes.

960 Q. Did you ever catch up with the end of that car?

A. No.

961 Q. At the time that you walked in there you had a view of the curvature of that track and the side of the building, didn't you?

A. No.

962 Q. What interfered with your view?

A. The building curve.

963 Q. I thought you testified that the first car was already spotted down here at the first door. Isn't that right?

A. Yes, that is right.

964 Q. There weren't any other cars on the track?

A. There was a car here and one here.

965 Q. There wasn't anything that interfered with your view of the track as it starts curving around the northwest corner of the Casein Building, when you came in the first time?

A. No, when I came in the first time I was back down here, (indicating).

966 Q. There wasn't anything then to interfere with your view of the track was there?

A. No.

967 Q. Or your view of the east side of the building?

[fol. 139] A. No.

968 Q. There wasn't anything to prevent you from seeing just how far the track was from the building as the track curved around over there?

A. Not from here, no.

969 Q. And when you walked out after the movement started, and the cars remained ahead of you all the time, there was nothing to prevent you then from having a full view of all of the Casein Spur track, at least from the point where the second loading platform is located, until it joins on to the Myrtle Street track, was there?

A. No.

970 Q. Now when that movement started out, the engine and the two cars, you knew at that time that it would be necessary to bring the first car behind the engine back in and re-spot it at the first door, didn't you?

A. Yes.

971 Q. And you knew that for that movement it would be necessary for the engineer to go out to the spur track, across the first switch?

A. Yes, sir.

972 Q. Move the tank car off the spot line, then switch for the lead and proceed back some distance west and cut off the second car?

A. Yes.

973 Q. Then you expected that following that the engineer would proceed east down the lead, beyond the switch, re-spot the tank car, then the switch would be lined for the spur and he would come back in and re-spot the car at the first door?

[fol. 140] A. All but spotting the tank car. I don't know whether they did that or not.

974 Q. Well, aside from that you knew that was going to be done?

A. Yes, sir.

975 Q. And that is the way it had been done before?

A. I don't know.

976 Q. Well, at least on other tracks?

A. Yes, that would be the normal way.

977 Q. What was your purpose in walking out?

A. Walking out where?

978 Q. Toward Myrtle Street.

A. To uncouple the car.

979 Q. Where was Brown?

A. Down by the switch.

980 Q. By which switch?

A. The Myrtle Street switch.

981 Q. Where was Field?

A. He was up by the engine.

982 Q. Didn't Field remain up by the Myrtle Street switch at the time the movement came in the first ime?

A. Yes.

983 Q. Wasn't it his duty as the head man to remain at the switch and to flag the crossing when the movement came out?

A. No.

984 Q. It was not?

A. No, not with a light engine.

985 Q. Well it came out with two cars.

[fol. 141] A. Well, the engine was ahead of the cars.

986 Q. Whose duty was it to protect the crossing for the engine to come out?

A. No one.

987 Q. Nobody?

A. No, not with a light engine.

988 Q. Well you didn't have a light engine when you came out of Casein Spur did you?

A. We had two cars behind it. We didn't have any ahead.

989 Q. And the view is much more restricted, so far as automobile traffic is concerned, to a movement coming out of the spur than it is to a movement going in, isn't it?

A. Yes.

990 Q. Wasn't it customary for someone to flag the crossing on movements coming out?

A. I don't know whether it was or not.

991 Q. Wouldn't that ordinarily be done by the head man?

A. Yes, in some instances.

992 Q. Do you know whether or not it was done in this instance?

A. No, I don't.

993 Q. What was your purpose in walking out toward Myrtle Street behind the movement?

A. To cut off the rear car.

994 Q. Isn't that ordinarily the duty of the field man?

A. No, not necessarily.

995 Q. Well, you say not necessarily. Do you mean that it isn't his duty, or that you and the field man might divide or share that responsibility?

A. That is right.

[fol. 142] Q. So that was your purpose in going out, was to cut off the second car?

A. Yes.

997 Q. Now there wasn't any necessity was there Mr. Ellis, after the engine and the two cars got out on the Myrtle Street track and the switch was again lined for he lead, there wasn't any necessity to move that car that was to be cut off any farther east than it would be necessary to clear the switch?

A. Yes. Oh, east, — yes, that is right, farther east than the switch.

998 Q. And it wouldn't be necessary to move it any farther west after you had proceeded down the lead, than to clear the switch?

A. Farther west?

999 Q. Yes.

A. Yes, there is a curve there and we would move it over that curve, because it is hard to couple on or uncouple on a curve,

1000 Q. Well, when you get beyond the switch the track is substantially straight isn't it for the distance of some sixty or seventy feet?

A. I don't know.

1001 Q. Well, come over and examine this plat.

A. (Witness examines plat) It looks like a curve to me.

1002 Q. Do you recall what the length of the second car was?

A. No, I don't.

1003 Q. Well you were the one that did cut off the second car, is that right?

A. Pardon me.

1004 Q. You were the member of the crew that did cut off the second car out on the lead?

A. Yes, that is right.

[fol. 143] 1005 Q. Do you know where Brown was at the time you cut off the second car?

A. No, I don't.

1006 Q. Had you seen him at any time after you had left

your position down by the second loading platform or dock?

A. Yes.

1007 Q. Where had you seen him?

A. I don't know where I had seen him.

1008 Q. Do you recall seeing Brown start back toward the first loading dock while you were out there and about ready to cut off the second car?

A. No, I don't.

1009 Q. Did you know that Brown was to return to the first loading dock to re-spot the car?

A. I thought he would, yes.

1010 Q. You expected him to?

A. Yes.

1011 Q. After you cut off the second car did you then pass some signals to the engineer?

A. I imagine I did, yes.

1012 Q. What sort of signal did you pass?

A. A hand signal.

1013 Q. To proceed ahead?

A. Yes.

1014 Q. And he did that, did he?

A. Yes.

1015 Q. And when he started to proceed ahead, what did you do next?

[fol. 144] A. I walked down toward the Casein Building.

1016 Q. In which direction did you walk?

A. South.

1017 Q. About how far did you walk before you came to a stop?

A. I don't know.

1018 Q. Well, you did come to a stop did you, on the pavement?

A. I imagine so, yes.

1019 Q. Do you have any recollection that you stopped on the pavement?

A. Well, I probably stood there to see that no cars were coming, until the movement of the engine had started back in there.

1020 Q. Well, that doesn't quite answer my question, Mr. Ellis. Do you have any recollection at this time that you did stop on the Myrtle Street paving?

A. No, I don't.

1021 Q. Do you have any recollection, Mr. Ellis, that you

stopped any place from the time you cut off the second car until you got hurt?

A. No, I wouldn't know where I stopped.

1022 Q. (Read by reporter) Do you have any recollection, Mr. Ellis, that you stopped any place from the time you cut off the second car until you got hurt?

A. No.

1023 Q. Do you have any recollection that you were stopped at the time you got hurt?

A. Sure.

1024 Q. Well where is the first place then that you recall stopping from the time you cut off the second car until the time you got hurt?

[fol. 145] A. The first place I recall that I stopped, I was walking along the building, looking for Brown, and I stopped and the car went past me and I turned my head to look at the engineer and it hit me. That is the only place I can recall.

1025 Q. Of course by that time you were over on the east side of the track, between the car and the building?

A. Yes.

1026 Q. And that is the only recollection you have now of stopping any place?

A. Yes.

1027 Q. From the time you cut off the second car until you got hurt?

A. Yes, sir.

1028 Q. You do recall, don't you Mr. Ellis, that the place where you crossed the track, that is, passed from one side of the track over to the other side of the track, was on the Myrtle Street paving?

A. No.

1029 Q. Do you recall what your position was when you did cross from one side of the track to the other?

A. It was down near that twelve inch extension on the building. There is a little projection on the building there, eleven or twelve inches, something like that.

1030 Q. Your recollection of the place where you crossed the track is that it was at the point where the building juts out about twelve inches closer to the track?

A. Yes.

1031 Q. That is the place that you selected to cross the track and to go between the track and the building?

A. That is the place I walked across.

[fol. 146] 1032 Q. Well the choice was yours, wasn't it?

A. Yes, sir.

1033 Q. It was your selection?

A. Yes.

1034 Q. And at the time you crossed the track at that point, where was the car, the end of the car that was coming in on to the spur?

A. Well, it would be some place in between the pavement and where I was standing.

1035 Q. Well, it was fifty feet away from you, wasn't it?

A. Well, I imagine. I don't know what the distance was.

1036 Q. Well, without knowing what the distance was, don't you remember that at that time the end of the car nearest you was out on the Myrtle Street paving?

A. Well, I couldn't say where it was, exactly.

1037 Q. Weren't you paying any attention to where the car was?

A. Yes, sir, sure.

1038 Q. Where was it?

A. It was coming back in there to be spotted.

1039 Q. How close was it to you?

A. I don't know.

1040 Q. You saw it didn't you?

A. I was there.

1041 Q. Why can't you tell me how far away it was from you?

A. Well, how could I tell how far it was.

1042 Q. You had plenty of time to cross the track as far as the movement was concerned, didn't you?

A. Yes, I had plenty of time.

[fol. 147] 1043 Q. Was the car a car length from you?

A. I couldn't say.

1044 Q. Well, is it your best judgment at this time that the car was about fifty feet away from you at the time you crossed the track?

A. I don't know.

1045 Q. You can't tell the Jury any more definitely than that?

A. No, I couldn't say there the car was. It was coming back in toward the place to be re-spotted.

1046 Q. There wasn't anything on the track between you and the car at the time you crossed the track, was there?

A. No, I don't think so.

1047 Q. You were watching the car as you were crossing the track?

A. Yes, I imagine I was.

1048 Q. Your purpose in crossing the track was what?

A. To pass signals.

1049 Q. Had you seen Brown down at the loading platform before you crossed the track?

A. Well, I don't know whether I did or not. He was supposed to be there.

1050 Q. After you crossed the track did you ever see Brown again?

A. No.

1051 Q. You couldn't see Brown after you crossed the track and got between the track and the building, could you?

A. Yes, I could if he had been in view, yes. If he was out of my sight I couldn't see him.

1052 Q. Well, you couldn't see the first loading platform at any time after you crossed the track, could you?

A. I don't remember whether I could or not.

[fol. 148] 1053 Q. Don't you remember that the curvature of the building prevented you from seeing the first loading platform after you crossed the track?

A. The platform sticks out a few feet. You probably could see it from where I was.

1054 Q. Do you know whether you saw it after you crossed the track?

A. No.

1055 Q. You know you didn't see Brown?

A. I don't think I saw Brown.

1056 Q. Well, you are certain of that aren't you?

A. Yes.

1057 Q. After you crossed the track you didn't receive any signal from Brown?

A. No.

1058 Q. And after you crossed the track you didn't pass any signals of any kind to the engineer?

A. Not that I know of.

1059 Q. How far did you walk between the track and the building, Mr. Ellis, before you came to a stop?

A. I think it was in the neighborhood of ten feet.

1060 Q. From the point where you crossed the track where the building juts out, down to the point where you got hurt?

A. Yes.

1061 Q. When you saw the car backing in as you were approaching and crossing the track, it was moving real slow, wasn't it?

A. Yes.

1062 Q. Somewhere between a mile and two miles an hour?

[fol. 149] A. Oh, I would imagine it would be two miles or better. Three miles is as fast as a man walks slowly.

1063 Q. Well, what is your recollection as to how fast it was proceeding in on that track?

A. Well, we will say two miles.

1064 Q. It might have been slower than that?

A. Yes, it could have been slower.

1065 Q. And the next time you saw the car from the time you saw it when it was a distance of about fifty feet away from you,—the next time you saw it was when the south end of the car proceeded past you, wasn't it?

A. Yes, sir.

1066 Q. And that was while you were standing still?

A. Yes, sir.

1067 Q. And it was still moving about two miles an hour, or maybe less?

A. As far as I know.

1068 Q. There was sufficient space between the place where you were standing and the end of the car, to permit the car to pass you safely, isn't that right?

A. That is right.

1069 Q. And if at the time the end of that car came up to you, you had started walking with it, you could have kept up with the end of the car, couldn't you?

A. If I had walked with the end of the car, yes.

1070 Q. Yes, you could have walked right alongside of the end of the car?

A. Yes, sir.

[fol. 150] 1071 Q. And if you had done that, walked at the front end of the car, between the car and the building, you could have walked the whole distance down to the loading dock on the west side of the Casein plant without having been hurt?

A. That is right.

1072 Q. Or if you had walked a distance of ten feet or such as a matter further along around the corner of the building, and had stopped, you would have been in the clear of all parts of the car, wouldn't you?

A. I don't know.

1073 Q. You don't know about that one way or the other?

A. No.

1074 Q. You hadn't watched the car from the time you saw it some fifty feet away from you until after the end of the car passed you. That is right, isn't it?

A. I guess so.

1075 Q. You hadn't made any attempt at all to see where the car was coming, or the distance between the inside of the car and the side of the building had you?

A. No.

1076 Q. You had known, Mr. Ellis, from your previous work with the Southern Pacific and with the Union Pacific up until the day you got hurt, the tendency for a car to overhang the most in the center on the inside of a curve. Isn't that right?

A. That is right.

1077 Q. There was nothing to prevent you, at the time you walked toward the Casein Building and at the time you crossed the track,—nothing to prevent you from seeing just what the situation was with respect to the curvature of that track was there?

[fol. 151] A. I don't get you.

1078 Q. (Read by reporter). There was nothing to prevent you, at the time you walked toward the Casein Building and at the time you crossed the track,—nothing to prevent you from seeing just what the situation was with respect to the curvature of that track, was there?

A. I assumed it was a safe place to work.

Mr. Hamer: I move that the answer be stricken as not responsive.

The Court: Sustained.

Plaintiff excepts.

1079 Q. There was nothing to prevent you from seeing just what the curvature was, was there?

A. No.

1080 Q. And of course the distance between the building and the nearest rail was at all times open and apparent to you from the time you started across the track, while you

were crossing the track and while you were walking between the track and the building?

A. Yes.

1081 Q. You didn't take any precautions for your own safety at all after you crossed to the east side of the track, did you Mr. Ellis?

A. There wasn't any precaution to take.

1082 Q. Well, you didn't take any precaution or make any observation for your own safety at all?

A. Assuming it was a safe place to work, there wasn't any reason for taking any precaution.

1083 Q. Did you take any?

A. No.

1084 Q. Did you make any observation, make use of your own eyes, for the purpose of trying to protect your-[fol. 152] self and save yourself from harm?

A. What do you mean by that?

1085 Q. Well, did you make any observation in an effort to try to save yourself from injury?

A. What kind of an injury?

1086 Q. (Read by reporter) Did you make any observation in an effort to try to save yourself from injury?

A. No.

1087 Q. During all the time on that day when you had been upon or around the Casein Spur track in connection with the movements going out and the car coming back in, the cars had always operated smoothly, so far as you observed?

A. That is right.

1088 Q. You didn't at any time observe any of the cars listing or pitching or lunging, or anything of that sort?

A. No.

1089 Q. Handing you Exhibit number 3, Mr. Ellis, which is a picture that you identified this morning as showing you at the place where you were standing at the time you got hurt, taken by Mr. Burns, let me call your attention to what appears to be a pole set in the ground just beyond the corner of the building as it appears in this picture. Do you see that?

A. Yes, I see the bottom of it, yes.

1090 Q. Do you know what that pole is?

A. No.

1091 Q. Isn't that a pole with an impaired clearance sign?

A. It could be.

[fol. 153] 1092 Q. That is the position it was in at the time the picture was taken, isn't it?

A. Yes, if that is what it is.

1093 Q. Well, you can make out, can't you, if you study the picture carefully, that there is a board that is also painted black on the back side of it, up against the dark background of the building that is across the track?

A. I can't see it.

1094 Q. Handing you Exhibit number 4, which you have identified as a picture taken by Mr. Burns in your presence, with the camera facing southwest, but perhaps more south than west, is that right?

A. That is right.

1095 Q. Where was Mr. Burns' camera at the time that picture was taken with reference to the impaired clearance sign?

A. If there is an impaired clearance sign, it would be out here, (indicating).

1096 Q. This picture was taken then from some point where the sign would not appear in the picture, is that right?

A. That is right.

1097 Q. Don't you remember that Mr. Burns was standing some distance south of the impaired clearance sign at the time that picture was taken?

A. Well, he would have to be, to take that picture.

1098 Q. Now signals to be given to the engineer in connection with re-spotting the car at the first loading dock, could have been passed from the west side of the track, away from the building, could they not?

[fol. 154] A. Yes. Not to the engineer, no. To the fireman.

1099 Q. Well, signals which would control the movement of the engine?

A. Yes.

1100 Q. You had on many occasions during the time you had been working for the railroad passed signals from the fireman's side?

A. No.

1101 Q. Had you ever?

A. Oh, yes.

1102 Q. Well, would it be proper to say that you had, on several occasions, passed signals to the fireman's side?

A. On several occasions, yes.

1103 Q. You knew that all that was necessary to do that

was to notify the engineer and the fireman that they would be passed from that side?

A. Yes.

1104 Q. And you knew, didn't you Mr. Ellis, that that was the proper thing to do whenever it would be dangerous to pass signals on the engineer's side?

A. Yes, if you knew it was dangerous, yes.

1105 Q. You didn't trip or stumble over anything?

A. Not that I know of.

1106 Q. Well, you know you didn't, don't you?

A. Yes, I don't think I did.

1107 Q. The only reason you got hurt was because you got into a place that was simply too close for you. Isn't that the truth?

A. That is right.

1108 Q. You don't have any criticism of the engineer or of the manner in which the movement was being handled, do you?

[fol. 155] A. If the engineer could have stopped like he said he could, and seen me all the time like he testified, I have.

1109 Q. Up to the time the engineer testified at the time his deposition was taken by Mr. Tautges, you didn't have any criticism of the engineer or of the manner in which the movement had been made, did you?

A. No.

1110 Q. From the 15th of March, 1943, up until the 6th day of March, 1944, nothing ever occurred to you that would cause you to attach any blame or fault to the engineer?

A. No, not in particular, no.

1111 Q. At the place where you stopped and remained standing until the front end of the car came along and passed beyond you, and until you were caught by the door that was on the car, that was the place as it appeared to you the greatest curvature of the track existed. Isn't that right?

A. I didn't know anything about it.

1112 Q. Let me ask you, Mr. Ellis, at the time your deposition was taken, if these questions were asked and if you made these answers: Question; "The place where you were standing is the place where the greatest curvature of that track occurs, isn't it?" Answer; "I believe so. I never

measured it. I don't know." Question; "Is that the way it appeared to you?" Answer; "That is the way it looked." Question; "As you were standing there?" Answer; "Yes." Did you so testify?

A. Yes.

1113 Q. You have a recollection at this time do you not, Mr. Ellis, that following the accident you recall Mr. Brown and Mr. Field being with you?

[fol. 156] A. Yes.

1114 Q. Do you recall how long Mr. Brown remained with you?

A. No, I don't.

1115 Q. You do recall Mr. Brown being there?

A. Yes.

1116 Q. And you also recall Mr. Field being there?

A. Yes.

1117 Q. And you recall them being there together?

A. Yes.

1118 Q. Now you also recall, don't you, that Mr. Field remained there with you for some considerable time?

A. Yes, I believe he held me down, so I couldn't get up.

1119 Q. Do you also recall that he took off his coat to cover you?

A. No.

1120 Q. You recall that you were administered some opiates, given some hypodermics for your pain, at the hospital?

A. Yes.

1121 Q. I assume that that reduced your pain somewhat?

A. Yes.

1122 Q. About how long did you have those? How long were you given opiates or medicine for the relief of your pain?

A. I imagine about four weeks.

1123 Q. You say you imagine it?

A. I don't know. I am just guessing at it.

1124 Q. Are you basing that just on what would be logical, or on what you recall?

A. I am just guessing at it. I don't know.

1125 Q. You do recall that there were some X-rays taken on the second day or the third day you were in the hospital?

[fol. 157] A. Yes, sir.

1126 Q. You recall being taken to the X-ray room?

A. Yes.

1127 Q. And you also recall very definitely that you were told by somebody that you had seventeen fractures of your ribs?

A. Yes.

1128 Q. You remember that very definitely?

A. Yes. Not on that day though, but later on in the hospital I was told that.

1129 Q. Well, weren't you told that within a day or two after the X-rays had been taken?

A. I don't know just when it was.

1130 Q. How are you paid by the railroad, or how were you paid by the railroad, Mr. Ellis, during the time you were working there?

A. Twice a month.

1131 Q. Did you get it in the form of cash or in the form of checks?

A. In the form of checks.

1132 Q. Was that true in every instance?

A. Yes.

1133 Q. You got your checks twice a month?

A. That is right.

1134 Q. One check would cover the period from the first of the month to the 15th, and the next would cover the period from the 15th to the last of the month?

A. Yes.

1135 Q. Was any overtime that you worked included in your checks?

A. Yes.

[fol. 158] 1136 Q. You didn't receive any compensation from the railroad for your switching work except through the medium of checks, that is right isn't it?

A. Yes.

1137 Q. Do you recall what your check was for the first month you worked?

A. No.

1138 Q. Or what your checks were for the first month you worked?

A. No.

1139 Q. Do you recall what your total earnings were for the first month?

A. The first month I worked?

1140 Q. Yes.

A. No, I just don't.

1141 Q. Do you recall what they were for the month of May, 1942?

A. No.

1142 Q. Do you recall what they were for the month of June, 1942?

A. No.

1143 Q. Or July?

A. No.

1144 Q. Or August?

A. No.

1145 Q. Or September?

A. No.

1146 Q. Or October?

A. No.

1147 Q. Or November?

A. No.

1148 Q. Or December?

A. No.

[fol. 159] 1149 Q. Or January, 1943?

A. I don't recall.

1150 Q. On what were you basing your testimony this morning, Mr. Ellis, when you testified on direct examination that during the month of January you earned $360.00?

A. Well, I looked at my time book. I was going by my time book. As near as I could figure it out, it amounted to $360.00 in January. I haven't got my time book with me. It don't cover only three or four months, something like that.

1151 Q. Well was it from information in your time book that enabled you to testify on direct examination that your earnings for the month of February were $250.00?

A. That is right.

1152 Q. Were there some deductions made from your checks at the time you received them?

A. Yes.

1153 Q. Do you remember what those deductions amounted to, approximately?

A. Well, I don't know what they were. It was according to how much I earned.

1154 Q. Well, there wasn't any withholding tax during the time you were employed, was there?

A. No, I guess not.

1155 Q. There was deducted a certain per cent under the Carriers' Tax Act, approximately three per cent?

A. Yes.

1156 Q. And there was deducted during part of the time you worked there the five per cent Victory Tax, wasn't there?

[fol. 160] A. Yes.

1157 Q. There was also deducted something for the Hospital Department?

A. Yes.

1158 Q. Do you remember what that amounted to?

A. From $1.50 to $2.50 a month.

1159 Q. And then there was ten cents for the Family League?

A. I don't remember that.

1160 Q. Do you remember any more deductions?

A. No.

1161 Q. Were you buying any equipment of any sort that was being deducted from your pay check?

A. No.

The Court: We will adjourn until 9:30 tomorrow morning, Gentlemen.

(Court reconvened at 9:30 A. M., May 10, 1944, pursuant to adjournment, and hearing of the above entitled cause was resumed, Mr. Newton W. Ellis being recalled by Mr. Robert Hamer for further cross examination, and testifying on his own behalf as follows).

1162 Q. Mr. Ellis, shortly before we adjourned yesterday afternoon you were testifying with respect to what your earnings had been with the Union Pacific. As I recall you testified that from the time book you kept, that you had with you, you had computed that your salary for your services for the month of January, 1943, was approximately $360.00. Is that correct?

A. I didn't way I had my time book with me, no.

1163 Q. You had computed that though from some time book at some time?

[fol. 161] A. Yes, I made an estimate. I didn't check it over thoroughly.

1164 Q. Did you use your time book in making the computation that you testified to with respect to your earnings for the month of February?

A. I just estimated that. I never checked it over close, no.

1165 Q. Did you make any computation at all with respect to what your earnings had been in the month of December, 1942?

A. No, I didn't.

1166 Q. You recall, do you not, that the five per cent Victory Tax deduction went into effect with respect to services performed, after January 1, 1943?

A. I don't know. It went into effect some time. I don't know just when.

1167 Q. Well, do you remember that there was no deduction made for Victory Tax until you got your checks for services for January, 1943?

A. No, I don't remember when, no.

1168 Q. Handing you, Mr. Ellis, what the reporter has marked as Exhibit number 5, I would like to have you examine that and the endorsement on the back and state whether or not that is the check that you received from the Union Pacific for your services for the period in February, 1943, from the first to the fifteenth?

A. That has no deductions for insurance or hospital fee. This is after all the deductions are taken out.

1169 Q. But that is the check you received?

A. Yes, it is. My signature is on the back.

1170 Q. That is your endorsement on the back of the check is it not?

A. Yes, that is right.

[fol. 162 1171 Q. Handing you Exhibit number 6, let me ask you if that is the check which you received for your services for the month of February, for the period from the 16th to the 28th?

A. Yes, after the deductions are taken out.

1172 Q. Is that your endorsement?

A. No, it is not.

1173 Q. Did your wife sign your name there?

A. No, that is my endorsement. I signed it with my left hand. That was when I was in the hospital.

1174 Q. Then I assume that is your wife's signature immediately below yours.

A. Yes, sir, that is right.

1175 Q. Handing you Exhibit number 7, let me ask you if that is the check you received for your services for the mo-th of March, 1943, for the period from the 1st to the 15th?

A. Yes. I was hurt on the 15th. I didn't sign that at all.

1176 Q. You didn't sign this?

A. No, I couldn't.

1177 Q. Isn't the endorsement, Newton W. Ellis, your signature?

A. That is my counter signature at the bottom. Someone else signed it for me. I don't know.

1178 Q. Well look at the words Newton W. Ellis on the back of the check. Isn't that your signature? Didn't you sign that?

A. Maybe I did. It don't look like my writing, but I probably did. It was with my left hand if I did. It don't look like my writing.

1179 Q. Well, do you remember whether you signed it with your right hand or your left hand?

A. I probably signed it with my left hand, yes.

[fol. 163] 1180 Q. Now referring to Exhibit number 6, you testified that the endorsement Newton W. Ellis which appears on that exhibit was signed with your left hand?

A. That is right. This was probably signed with my left hand too.

1181 Q. Both of them were signed with your left hand?

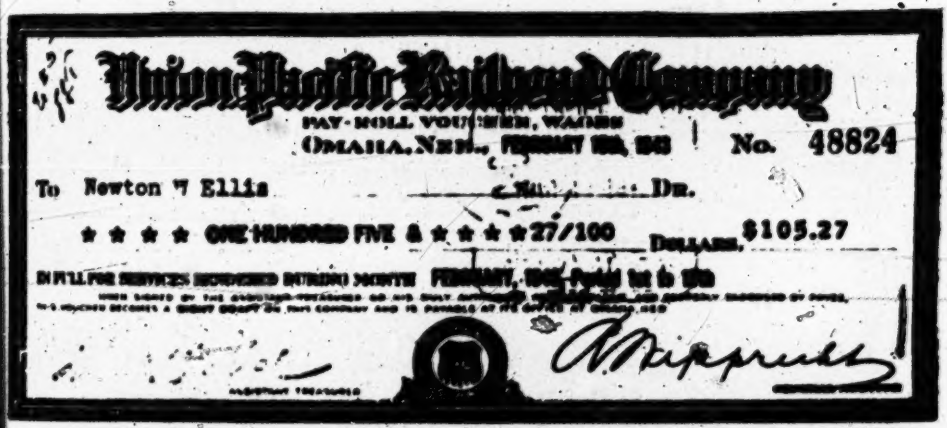
A. I think so.

1182 Mr. Hamer: Defendant offers in evidence as part of the cross examination of this witness Defendant's Exhibits numbers 5, 6 and 7.

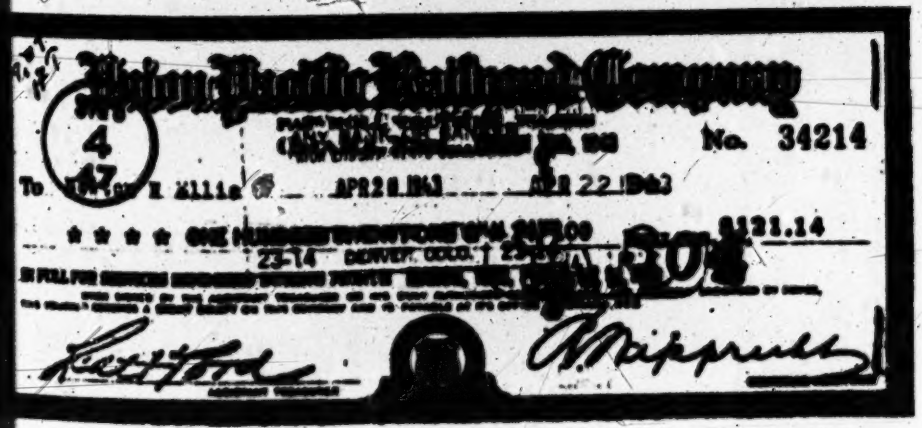
Mr. Tautges: There is no objection to them.

Defendant's Exhibits Numbers 5, 6 and 7 having been offered in evidence and received without objection, same are attached to and made a part of this Bill of Exceptions.

Defendant's Exhibits Nos. 5, 6 and 7


Union Pacific Railroad Company
PAY-ROLL VOUCHER, WAGES
OMAHA, NEB., FEBRUARY 15th, 1943 No. 48824
To Newton W Ellis Dr.
★ ★ ★ ★ ONE HUNDRED FIVE & ★ ★ ★ ★ 27/100 DOLLARS $105.27
IN FULL FOR SERVICES RENDERED DURING MONTH FEBRUARY, 1943 Period 1st to 15th
THIS VOUCHER BECOMES A SIGHT DRAFT ON THIS COMPANY AND IS PAYABLE AT ITS OFFICE AT OMAHA, NEB.
ASSISTANT TREASURER

Union Pacific Railroad Company
PAY-ROLL VOUCHER, WAGES
OMAHA, NEB., FEBRUARY 28th, 1943 No. 106284
To Newton W Ellis Dr.
★ ★ ★ ★ ★ ★ ★ ★ ★ ★ FIFTY-EIGHT & ★91/100 DOLLARS $58.91
IN FULL FOR SERVICES RENDERED DURING MONTH FEBRUARY, 1943 Period 16th to 28th
THIS VOUCHER BECOMES A SIGHT DRAFT ON THIS COMPANY AND IS PAYABLE AT ITS OFFICE AT OMAHA, NEB.
ASSISTANT TREASURER


Union Pacific Railroad Company
No. 34214
To Newton W Ellis APR 28 1943 APR 22 1943
★ ★ ★ ★ ONE HUNDRED TWENTY-ONE & 14/100 $121.14
23-14 DENVER, COLO.
IN FULL FOR SERVICES RENDERED DURING MONTH
ASSISTANT TREASURER

Justus W. Ellis
3014 Lafayette St.
Denver, Colorado

Justus W. Ellis
3014 Lafayette St.
Denver, Colorado

[fol. 166] 1183 Q. Now, Mr. Ellis, handing you what has been marked as Exhibit number 8, let me ask you if that is a check that you received from the Union Pacific for your services for the month of January, 1943, for the period from the 1st to the 15th?

A. Yes.

1184 Q. And calling your attention to the endorsement on the back of that check, is that your signature?

A. That is right.

1185 Q. And was that signed with your right hand?

A. That is right.

1186 Q. And referring to Exhibit number 9, would you examine that and state whether or not that is a check you received from the Union Pacific for your services for the month of January, 1943, for the period from the 16th to the 31st?

A. Yes, sir, that is the check, with the deductions taken out.

1187 Q. Now directing your attention to the signature, the endorsement Newton W. Ellis, appearing on the back of Exhibit number 9, I will ask if that is your signature and if that was written with your right hand?

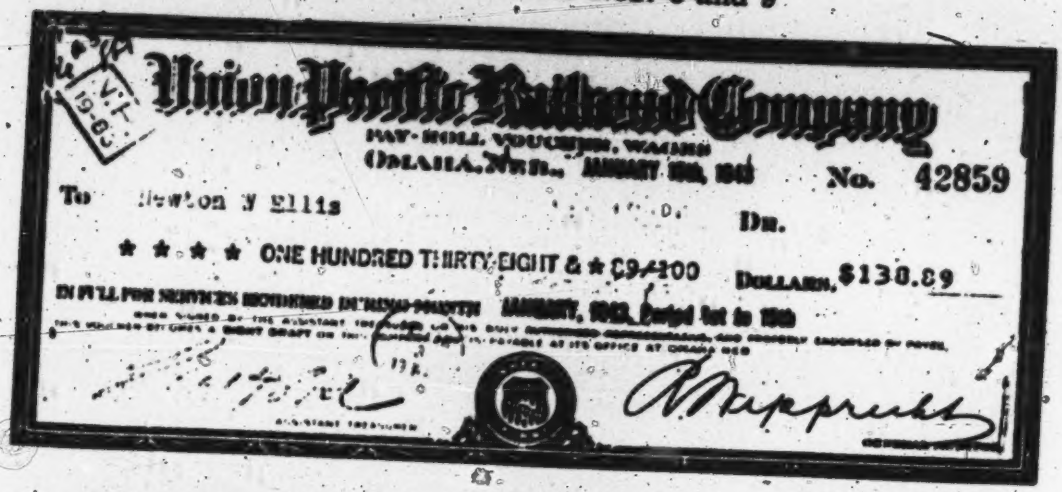
A. Yes, sir.

1188 Mr. Hamer: Defendant offers in evidence exhibits numbers 8 and 9.

Mr. Tautges: There is no objection to them.

Defendant's exhibits numbers 8 and 9 having been offered in evidence and received without objection, same are attached to and made a part of this Bill of Exceptions.

Defendant's Exhibits Nos. 8 and 9



Union Pacific Railroad Company

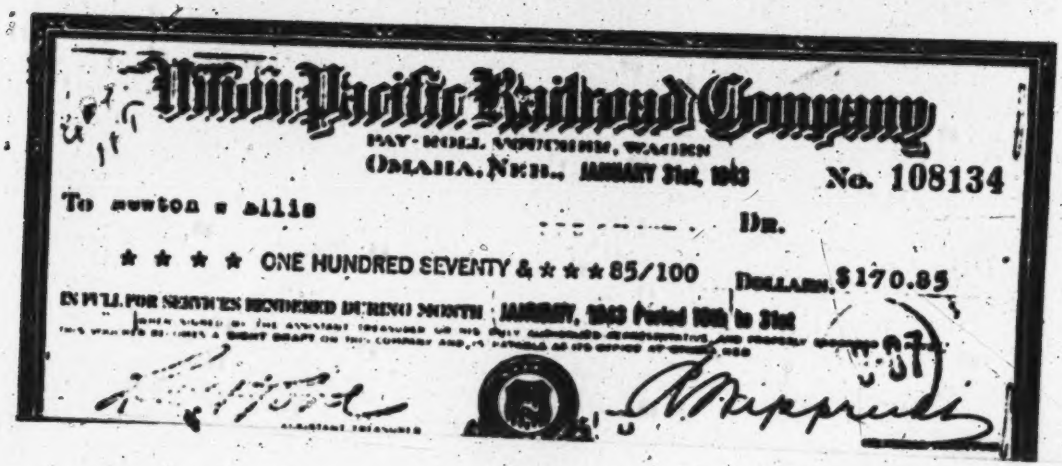
PAY-ROLL VOUCHER, WAGES

OMAHA, NEB., JANUARY 15th, 1943 No. 42859

To Newton W Ellis Dr.

★ ★ ★ ★ ONE HUNDRED THIRTY-EIGHT & ★ 09/100 DOLLARS, $138.09

IN FULL FOR SERVICES RENDERED DURING MONTH JANUARY, 1943, Period 1st to 15th



Union Pacific Railroad Company

PAY-ROLL VOUCHER, WAGES

OMAHA, NEB., JANUARY 31st, 1943 No. 108134

To newton w ellis Dr.

★ ★ ★ ★ ONE HUNDRED SEVENTY & ★ ★ ★ ★ 85/100 DOLLARS, $170.85

IN FULL FOR SERVICES RENDERED DURING MONTH JANUARY, 1943 Period 16th to 31st

167

PAY TO THE ORDER OF
ANY BANK, BANKER, TRUST CO. OR
ANY FEDERAL RESERVE BANK
PRIOR
PAY
27-12
27-1
NATIONAL BANK
COMMERCE
SEATTLE

4-26
124
FEB

FEB - 3 1943
NATIONAL BANK
73-14

[fol. 168] 1189 Q. Now Mr. Ellis, to save time here, you will find that these checks, I think are all in order and run for a period from April, 1942, down to and including December, 1942. Keeping them in the order that they are, and examining them, let me ask you if from your examination of these checks you find that for the month of April, 1942, you received one check in the face amount of $85.93, for the first period?

A. Not for the first period. That would be for the last period of April.

1190 Q. Will you examine the check?

A. That is from April 15th.

1191 Q. Well then, the check you received for the first part of April was $61.79?

A. That is right.

1192 Q. And that makes a total for the month of April of $147.72?

A. Yes, that is right.

1193 Q. Then in May the check you received for the first period was in the amount of $130.63. Is that right?

A. That is right.

1194 Q. And for the second period, $119.64?

A. That is right.

1195 Q. Making a total of $250.27?

A. That is right.

1196 Q. In June the check you received for the first period was $111.06, and for the second period, $114.69, or a total of $225.75?

A. That is right.

1197 Q. For July, the check you received for the first period was $113.88?

A. That is right.

[fol. 169] 1198 Q. And for the second period $123.56?

A. That is right.

1199 Q. Or a total of $237.44 for your services for the month of July?

A. Correct.

1200 Q. In August you received a check for the first period in the amount of $116.40?

A. That is right.

1201 Q. And for the second period a check in the amount of $116.00 even, making a total of $232.40. Is that right?

A. That is right.

1202 Q. In September you received a check for the first period in the amount of $122.69?

A. That is right.

1203 Q. In the second period in the amount of $128.82?

A. That is right.

1204 Q. Or a total for the month of September of $251.61?

A. That is right.

1205 Q. In October you received a check for $130.98 for the first period and for the second period a check in the amount of $136.82?

A. That is right.

1206 Q. Or a total of $267.80?

A. That is right.

1207 Q. In the month of November you received a check for $129.72 for the first period?

A. That is right.

1208 Q. And for the second period a check in the amount of $124.90, or a total for the month of November of $254.62. Is that right?

A. That is right.

1209 Q. In December you received a check for the first period in the amount of $109.71, and for the second period of $141.97, or a total in checks of $251.68. Then you also [fol. 170] received an additional voucher in the sum of $9.24 for services rendered during the month of December, did you?

A. That is right.

1210 Q. And the total then, including the additional voucher, you received for your services in the month of December was $260.92?

A. That is right.

1211 Q. The amount you received in January, which you have testified that all told your earnings were approximately $360.00,—that was just about $100.00 more than you had earned in any previous month or that you earned in any subsequent month, so long as your worked for the Union Pacific, isn't that right?

A. I don't know. It could be.

1212 Q. Now I notice, Mr. Ellis, that your check for the month of October, 1942, or your checks for that month, were somewhat in excess of what they had been in August or

September, or what they were in November or December. How do you account for that?

A. Working sixteen hours, with time and a half for over time.

1213 Q. You worked longer hours during that time?

A. Yes, sir.

1214 Q. At the time you were in the Providence Hospital in Seattle the first time, when did you first commence to receive visitors?

A. They wouldn't let anyone in only my folks for about a week, somewhere around a week.

1215 Q. And you had some visitors other than your immediate family, as you recall, some time then about the 22nd or 23rd of March, for the first time?

[fol. 171] A. I couldn't remember that at all, what dates they were there or anything. There was people up to see me, yes.

1216 Q. Did you visit with them when they came in to see you?

A. I looked at them, yes.

1217 Q. Well, did you talk with them?

A. Yes.

1218 Q. You carried on a conversation with them?

A. Yes, more or less.

1219 Q. How long did they remain with you?

A. Oh, maybe fifteen minutes or half an hour.

1220 Q. How frequently did you have visitors?

A. Well, I don't know. It is kind of hard to say.

1221 Q. Well, do you think you had visitors,—at least did somebody drop in to see you once a day?

A. Yes, I imagine.

1222 Q. Some days more than that?

A. Some days there would be more people, yes.

1223 Q. You enjoyed visiting with them did you?

A. Naturally.

1224 Q. And after you had been there about the first week, you continued to receive visitors and to talk with them during the whole period of the six weeks that you remained in the hospital on the first occasion?

A. Yes, sir.

1225 Q. How do you go between Port Orchard and Seattle? What is the usual way of traveling between those two places?

A. Ferry.

1226 Q. You take a ferry, a small boat, across the bay to Bremerton?

[fol. 172] A. Yes, you can.

1227 Q. Or you can drive around over to Bremerton?

A. Yes, or you can drive to Manchester and take a ferry direct in to Seattle.

1228 Q. When you were taking your trips to Seattle, how did you go?

A. I went in the car.

1229 Q. On the ferry?

A. Yes.

1230 Q. That is, you would drive your car on to the ferry and the boat would take you across?

A. I did not drive the car.

1231 Q. Well, the car was driven on to the ferry?

A. Yes, one of my boys drove the car.

1232 Q. And the eighteen miles distance was partially while you were sitting in the car and were being carried in the ferry?

A. I was in the back seat, propped up by pillows.

1233 Q. Well, the eighteen miles was the boat trip also?

A. Practically, about three or four miles in Seattle, and about the same at Port Orchard.

1234 Q. How far is it by automobile road from Port Orchard to Seattle?

A. Well, by ferry it is eighteen miles. That is what they say. They claim it is eighteen miles by ferry.

1235 Q. You mentioned that you were examined by Dr. Evans in Minneapolis, in the latter part of August or the first part of September. However, Dr. Evans' testimony from his records was that he examined you on September 8, 1943, for the first time. I assume that as far as fixing the date is concerned, you would be willing to concede that his records are correct?

[fol. 173] A. That is right.

1236 Q. That was after this case was filed in this court, was it not?

A. I couldn't say. I don't remember. Perhaps it was.

1237 Q. Well, it was after you had employed attorneys?

A. That is right.

1238 Q. And you went to see Dr. Evans by reason of some appointment that Mr. Tautges had made with Dr. Evans?

A. That is right.

1239 Q. And it was after you had been examined by Dr. Evans in Minneapolis that you came down to Omaha, and while in Omaha you were examined by Dr. Fouts and Dr. Sucha?

A. That is right.

1240 Q. Handing you what the reporter has marked as Defendant's Exhibit number 10, would you examine that and state if your signature, Newton W. Ellis, appears upon that exhibit?

A. It is my signature, yes.

1241 Q. Now Mr. Ellis, to clarify one point in connection with the number of times that you had been down on the Myrtle Street track before March 15th, 1943, it is my understanding that it is your testimony at this time that you do now recall having been down on the Myrtle Street track in connection with movements that were being made on the Casein Spur on about four occasions in the summer of 1942?

A. No, I don't have any recollection.

1242 Q. Well you remember, don't you, that you did testify at the time your deposition was taken, a part of which was read to you yesterday, that you were on the Myrtle Street track on four occasions in the summer of 1942 in connection with the movement of cars that went in [fol. 174] to the Casein track or came off of the Casein track?

A. I said I didn't remember them.

1243 Q. Well I say, do you remember that you testified to that fact at the time your deposition was taken?

A. I testified that I probably could have been in there three or four times, not on the Casein Spur, but on Myrtle Street, yes.

1244 Q. Do you remember who you were with on any one of those occasions when you may have been or were on the Myrtle Street track in connection with movements into the Casein Spur?

A. No, I don't.

1245 Q. Do you recall whether you were down there on one of those occasions at a time when Mr. Monroe was the engine foreman?

A. No, I don't.

1246 Q. Do you deny that on one of the occasions when

you were on the Myrtle Street track in connection with movements going into the Casein Spur, that you were there with a crew of which Monroe was foreman?

A. I don't remember of it.

1247 Q. Well, do you deny it?

A. Yes.

1248 Q. You do?

A. Yes.

1249 Q. Do you deny that you were down on the Myrtle Street track in connection with movements being made into or out of the Casein Spur, when you were a member of a crew of which Mr. Olsen was either foreman or acting [fol. 175] foreman?

A. I don't remember of it, no.

1250 Q. Do you deny it?

A. I don't remember of it at all.

1251 Q. Do you deny being there with Olsen?

A. Yes.

1252 Q. On that occasion?

A. Yes. I don't remember it.

1253 Q. Do you deny being there on the Casein Spur with Olsen?

A. I don't remember of it at all.

1254 Q. Do you deny it?

A. Yes.

1255 Q. Do you recall whether it was on one of the occasions that you were down on the Myrtle Street track in connection with movement into the Casein Spur, that you were a member of a crew of which Mr. Murphy was foreman?

A. I could have probably been down on Myrtle Street with Murphy, yes.

1256 Q. Your recollection that you were there with Murphy is clearer than it was with respect to either Olsen or Monroe. Is that right?

A. I don't remember being there with him, but there would be more chance of being there with him, because I worked with him longer.

1257 Q. How long did you work with Mr. Murphy?

A. About a month.

1258 Q. Do you remember whether you worked with Mr. Murphy during the months of July, August, September and October, 1942?

A. Yes, I imagine I did.

[fol. 176] 1259 Q. Murphy was the foreman at that time, during that period from July to October, wasn't he?

A. That is right.

1260 Q. When you were on the Myrtle Street track in connection with movements of cars that were coming in and going out of the Casein Spur, what observation did you make on those occasions with respect to the track and the building and the other objects that were there?

A. I don't remember any.

1261 Q. You don't remember of any?

A. No, sir.

1262 Q. Do you recall, during those occasions, what if anything you observed about the corner of the Casein Building?

A. I don't remember being there.

1263 Q. What observation, if any, did you make Mr. Ellis, on the day you were hurt, before you got hurt,—what observations did you make in the vicinity of the corner of the Casein Building?

A. I didn't make any.

1264 Q. You didn't make any?

A. No, sir, I was after a car. I wasn't after objects or buildings. I was after a box car.

1265 Q. Were you over in the vicinity of the corner of the building on the day you were hurt, at any time?

A. Which corner.

1266 Q. The northwest corner of the building, where the track starts around the building.

A. No.

1267 Q. You were not there in that vicinity at any time the day you were hurt?

[fol. 177] A. No.

1268 Q. Had your ever been in the vicinity of that corner at any time before, on any other occasion, before the day you got hurt?

A. I don't remember of it at all, no.

1269 Q. What opportunity had you had then, Mr. Ellis, to make observation of what the conditions were on the ground in the vicinity of the corner of the Casein Building, before you got hurt?

A. I never had any.

1270 Q. So up until after you were hurt then, you say you had made no observations of any kind as to what the conditions were in the vicinity of the northwest corner of the Casein Building, at the place where the track starts around the building?

A. I don't remember of making any, no.

1271 Q. Of course if you had made such observations before the day you were hurt, then you must necessarily have been there, in a position to see, is that right?

A. Yes, if I had been there before, I probably would have seen.

1272 Q. Well, if you had observed before you got hurt, certain conditions in the vicinity of the corner of the building, and other conditions between the track and the building, you must necessarily have been in a position at some time to have seen those objects. Isn't that right?

A. Sure.

1273 Q. Let me ask you if at the time your deposition was taken you were asked these questions and did you make these answers: (interrupted).

Mr. Tautges: What page is that?

Mr. Hamer: Page 56.

[fol. 178] 1274 Q. (continued) Question; "What observation, if any, did you make while you were standing there with respect to the distance from the building to the rail nearest the building?" Answer; "I don't know that I made any." Question; "Didn't you look around at all?" Answer; "I would have to watch where I was walking there. There was a bunch of ties and boards and things." Did you so testify?

A. That is right.

1275 Q. What ties and boards and things did you have in mind at the time your deposition was taken and you gave that testimony?

A. I don't know if there were any ties, but there were boards laying around there that they throwed out of the building.

1276 Q. When had you observed those?

A. When I was back there after the accident.

1277 Q. Let me ask you if following that, this question was asked and if you made this answer? Question; "Do you recall seeing any ties or boards?" Answer; "No, I

don't recall seeing any. I know there is a lot of stuff in there."

A. That is right.

1278 Q. Now from what, Mr. Ellis, did you know that there was a lot of stuff in there that you would have to watch where you were walking?

A. Because I was back there after the accident, and there still is a lot of stuff in there. There are nails and boards. I said ties, but I don't remember seeing any ties.

1279 Q. Well you didn't remember seeing any boards or ties at the time you were standing between the track and the building before you got hurt, did you?

[fol. 179] A. No, I couldn't identify them.

1280 Q. Let me ask you if this question was asked and if you didn't make this answer: Question; "The ground is perfectly level isn't it?" Answer; "Yes, there is a manhole there, and a bunch of boards lying in there." Did you so testify?

A. Yes.

1281 Q. The next question was, "Where is the manhole?" Answer; "It is right there at the corner of the building, the northwest corner." Question; "When had you observed the manhole?" Answer; "Well, I don't know." Question; "Sometime past, when you had been in there?" Answer; "I can't say that, because I don't remember paying any particular attention to it." Did you so testify?

A. Yes.

1282 Q. Question; "You knew that there was a manhole there?" Answer; "Yes." Question; "You knew that before you went in on this occasion, didn't you?" Answer; "I imagine I did." Did you so testify?

A. Yes.

1283 Q. Now there is only one way isn't there, Mr. Ellis, to get in to the Casein Spur track with an engine and cars?

A. That is right.

1284 Q. And on the evening that this accident occurred the engine went in on both occasions when it did go in, just as it had always gone in before, didn't it?

A. As far as I know, yes.

1285 Q. Well, at the time your deposition was taken you testified that there was just one way to get in to the Casein Spur didn't you?

[fol. 180] A. Yes.

1286 Q. And you testified that there was no track connection down at this end?

A. That is right.

1287 Q. And you also testified, and it is a fact isn't it, that this Myrtle Street track comes to an end down here some three or four hundred feet east of the Casein Spur switch?

A. I don't know how far it goes.

1288 Q. Well, you know it doesn't continue along and connect up with any other tracks, don't you?

A. Not that I know of, no.

1289 Q. Do you know how many cars could be put on the Casein Spur track?

A. I do not.

1290 Q. You knew how many doors there were?

A. I believe there are three.

1291 Q. And at the time your deposition was taken let me ask you if you were asked this question and if you made this answer, page 58, line 25: Question; "So all the times before this,—and you think it was about four times before this evening,—you had always gone in the same way?" Answer; "Yes". Question; "Had you been in there the day before?" Answer; "No." Question; "Do you recall any time when you had been in there between the day that you got hurt and when you had been in there during the summer of 1942?" Answer; "No, I do not." Did you so testify?

A. Yes.

1292 Q. And when you testified that you had not been in there between the four times you were in there in the summer of 1942, and up until the day you got hurt, what were you referring to as being in there?

[fol. 181] A. I meant that if I did go in there, the engine would have to go in that way.

1293 Q. And where did you mean by there?

A. The Casein Spur, if they went in there.

1294 Q. Handing you a photograph which has been marked Exhibit number 11, let me ask you to examine that photograph and state if the manhole you referred to at the time your deposition was taken is not shown in that photograph.

A. Yes, that is it. (indicating).

1295 Q. There isn't any other manhole anywhere along

the Casein Spur track except the one shown in this picture, Exhibit number 11, is there?

A. I don't know of any.

1296 Q. And when you testified at the time your deposition was taken that you had observed the manhole on some occasion before the day you got hurt, that was the manhole you were talking about?

A. I said, — (interrupted).

1297 Q. Is that the manhole you were talking about at the time your deposition was taken?

A. Yes. I never observed it before, because I never was in there before.

1298 Q. Does that picture, so far as you are concerned, correctly portray what the situation was on the day you got hurt?

A. I don't know.

1299 Q. Well, do you see anything about that picture, so far as the tracks or the buildings are concerned, that appear any different in this picture than they did on the day the accident occurred?

A. I couldn't recall how it looked on the day the accident occurred.

[fol. 182] 1300 Q. You recognize it of course as a picture of the Casein Building?

A. That is the Casein Building, yes.

1301 Q. And a picture of the track that goes along the building?

A. Yes, sir.

1302 Q. And the paving shown in the foreground is part of the paving on Myrtle Street?

A. Yes, that looks like it.

1303 Mr. Hamer: Defendant offers in evidence as part of the cross examination of this witness, Exhibit number 11.

Mr. Tautges: No objection.

Defendant's Exhibit number 11 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

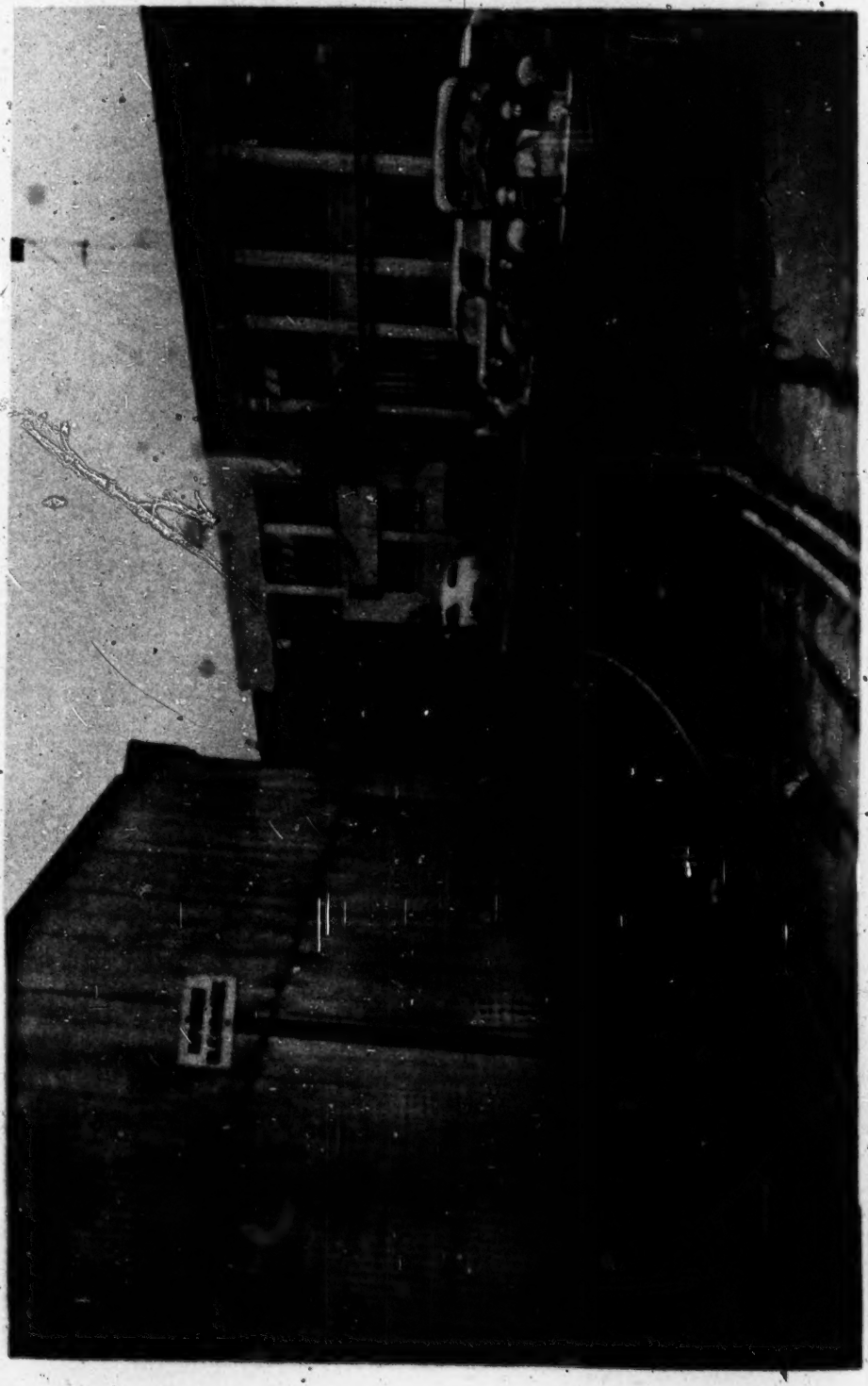
1304 Q. Just one further question, so that the Jury will be able to follow this, Mr. Ellis. I am now pointing to the same area that I pointed out to you, or that you pointed out to me as being the manhole. Is that right?

A. That is right.

Mr. Hamer: I believe that is all.

(Here follows 1 photolithograph side folio 183.)

Defendant's Exhibit No. 11



[fol. 184] Redirect examination.

By Mr. Tautges:

1305 Q. Mr. Ellis, yesterday when Dr. Hamsa was on the stand there was some talk about the work that a plasterer does and which arms or hands he uses and Mr. Hamer here brought in something about a bucket of mud or plaster that a plasterer would carry. Will you tell the Jury just how a plasterer does work and what tools and equipment he has?

A. The plasterer has a hawk, a trowel, — he doesn't carry a bucket. The hod carrier brings the mortar in a hod or wheelbarrow and dumps it on the board and the plasterer picks it up with the hawk. It holds about three or four trowels of mortar and you take it off with whichever hand you use and spread it on the ceiling or the side wall.

1306 Q. About how heavy is that hawk with three or four trowels of mortar on it?

A. I never weighed one. I would just have to guess at it.

1307 Q. Well, give us your best estimate.

A. I would say twenty-five pounds, — maybe thirty pounds.

1308 Q. Mr. Hamer took your deposition at Port Orchard on March 6th of this year, did he not?

A. Yes.

1309 Q. Do you recall that as the date?

A. Yes.

1310 Q. Between the time of the accident which was March 15, 1943, and the time that your deposition was taken, how many times had you been over to the vicinity of the place where you were hurt?

A. Three or four times.

[fol. 185] 1311 Q. Now this manhole to which your attention has been called, did you ever see or observe that before the time you were hurt?

A. No, I did not. Not that I remember of, no.

1312 Q. Did you intend to convey by anything that you did say at the time of your deposition that you had ever seen or observed that manhole before the time that you were hurt?

A. No, I did not. I was trying to imply that there was stuff around that building that would detract your attention from your work.

1313 Q. Now this picture which Mr. Hamer has intro-

duced in evidence, Defendant's Exhibit number 11, shows an impaired clearance sign at or near the northwest corner of the building. Did you ever at any time see or observe that sign before you were hurt on March 15, 1943?

A. No, I did not.

1314 Q. Before you were injured had anyone ever at any time called your attention to such a sign?

A. No, never.

1315 Q. When did you first see that impaired clearance sign?

A. It was after I was hurt, — some time in 1943.

1316 Q. Can you tell us approximately the date that you first observed the impaired clearance sign?

A. I imagine it was around August some time. I was in a cast at the time if I remember right, and that was July or August.

1317 Q. You think then it was some time during August, 1943?

A. Yes, during July or August, somewhere along in there.

1318 Q. At that time did you make some observation of the sign?

[fol. 186] A. Yes.

1319 Q. And from such observation as you made could you tell whether or not that was or appeared to be a new sign?

A. It looked like a new sign to me. There was fresh dirt around it and bolts that were not rusted. It looked like new paint.

1320 Q. And as to the post or standard upon which the sign was placed, how did that look and appear to you?

A. There was no rot about it. It looked like a new one.

1321 Q. Were there some bolts or nails or screws in that sign?

A. Yes, there were bolts in the sign, yes.

1322 Q. What was the appearance of those bolts as to being rusted or not?

A. I said they looked like they were new bolts. There was no rust on them.

1323 Q. Was the sign and the standard to which the sign was attached painted?

A. Yes.

1324 Q. What was the appearance of the paint?

A. It looked like new paint.

1325 Q. The lettering and what the lettering was painted on, how did that appear?

A. The letters were black and the face of the board was white.

1326 Q. Did that appear to be fairly new or fresh paint?

A. It looked like it was new, yes.

1327 Q. What was the black lettering painted on?

A. Inpaired clearance.

1328 Q. But that was a wooden board, was it?

[fol. 187] A. Yes, sir.

1329 Q. Was there any white paint on that?

A. Yes, the face of the board was white.

1330 Q. How did that appear as to being fresh or new and clean?

A. It looked like new paint. It wasn't dirty.

1331 Q. Where the post was set into the ground, was there any grass around there at all?

A. No, not next to the post there wasn't, no.

1332 Q. And away from the bottom of the post, how close was the grass?

A. Oh, about a foot, something like that. It looked like someone had dug the post hole.

1333 Q. Take the area from a foot out and around the post, what was the appearance of that?

A. There was grass out there.

1334 Q. I mean within a foot or so away from the post, and over to the post, and all around, what was the appearance there?

A. That was just dirt. It looked like just plain dirt, like a hole had been dug and the post set in and tamped in. There was no grass in there.

1335 Q. Did that look like a fairly new or fresh job?

A. It looked real fresh to me. It might have been a month or something like that old. I couldn't say.

1336 Q. Now in and about the location of the Casein Building, that district in there, do you know whether or not that used to be tide water in there?

A. Yes, I heard that it was. I couldn't say that it was, but I have been told that it was, yes.

[fol. 188] Mr. Hamer: I move that the answer be stricken for the reason that it discloses that the answer is entirely based on hearsay, and it is incompetent.

The Court: Sustained.

Plaintiff excepts.

1337 Q. Well, in and around Seattle, and particularly in and about that district where the Argo Yards are located, in that general zone, what is the fact as to whether or not there is considerable fog at different times of the year in and about that locality?

A. What is it?

1338 Q. Fogs.

Mr. Hamer: Objected to as immaterial, not tending to prove or disprove any issue in this case.

Mr. Tautges: Well, I will withdraw that question and ask another.

1339 Q. What is the rainy season out in that country, Mr. Ellis?

A. During the fall, winter and early spring.

1340 Q. What months does it cover?

A. From October to about the first of May.

1341 Q. In the winter months and in the early spring what is the fact as to whether or not there is more or less dampness in and about that part of Seattle?

Mr. Hamer: Objected to as immaterial.

Mr. Tautges: Well, it may have some bearing as to this sign, whether the boards would rust or not.

Mr. Hamer: That would depend on whether they were treated or untreated; whether they were painted or unpainted. There are several considerations involved in that.

[fol. 189] The Court: I don't see how it can help us. I will sustain the objection.

Plaintiff excepts.

1342 Q. Now the first time you went out to the scene of the accident was there anything in that immediate vicinity that looked as new, as clean and as bright as that sign post you saw there?

A. No, there was not.

1343 Q. Now Mr. Ellis, when you first went in on the Myrtle Street track, shortly before this accident happened, you testified that you got off the engine somewhere in the vicinity of switch "E" and walked down toward where these cars were, and I think you have testified that it was your duty to go down there and ascertain which car it was that was to be taken out. Is that right?

A. Yes,

1344 Q. Now when you got down to the cars, just what work did you have to do?

A. I had to take the number of the car, and the destination off of the tag.

1345 Q. What did you have with you when you went down there?

A. Just the engine.

1346 Q. Well this car that was to be taken out of there was a loaded car was it not?

A. Yes.

1347 Q. Did you have the waybill for it, or did you obtain one?

A. No, there was just a tag on the car.

1348 Q. What information was there on the tag?

A. It tells the destination and the number of the car.

[fol. 190] 1349 Q. And when you went over to where the tag was, you had to read that did you?

A. Yes.

1350 Q. Then did you have to make some record?

A. Yes, sir.

1351 Q. Calling your attention to Exhibit number 12, look at that and then state what that is.

A. That is an industrial sheet, as we call them. That has which station, — it has the destination of the cars on it and the numbers, and the time they were picked up and the time they were left at these destinations.

1352 Q. Is that a record you took with you when you got off the engine and went over to the cars?

A. Yes.

1353 Q. How much of that record was made out at the time you dropped off the engine?

A. Up to the last car, the one at the bottom.

1354 Q. And does this record contain the number of the car that you took out of the Casein Spur track to take along with the engine?

A. Yes, this last one.

1355 Q. Is that entire record made out in your handwriting?

A. Yes.

1356 Mr. Tautges: We offer in evidence Plaintiff's Exhibit number 12.

1357 Q. In making out this record, Mr. Ellis, did you make a notation of the time that you went over to this particular car that you were to take out of the Casein Spur track?

[fol. 191] A. Yes.

Mr. Hamer: May I ask a foundational question or two about this?

The Court: Yes.

Cross examination.

By Mr. Robert Hamer:

1358 Q. Are you supplied with these forms by the railroad?

A. I think so, yes.

1359 Q. Well, don't you know?

A. Yes.

1360 Q. Where did you get this one?

A. In the yard office.

1361 Q. How do you keep them while you are about your work?

A. I keep them in a book. There is a book of them.

1362 Q. You make this record as you go along during the course of the day, or do you wait until the end of the day to make it up?

A. I make it out as we go along.

1363 Q. And all of that is in your handwriting?

A. That is right.

1364 Q. Is it part of your duty in keeping one of these industrial records — I notice it has a form number, 2653, — is it part of the duty of the engine foreman to put down on this form who his helpers were?

A. That is right.

1365 Q. And you do that at the time you start out with them in the morning, or start out on your shift?

A. When we start out on the shift, yes.

1366 Q. If there is any change made as to who the helper is, — if some fellow should leave you in the middle of the shift, do you make a record then of the substitution or change of helpers?

[fol. 192] A. I suppose, yes.

1367 Q. Did you ever have that occur?

A. No, I never did, no.

1368 Q. You made your last entry on here of a car taken from Casein, going to the G. N. I suppose that means the Great Northern.

A. That is right.

1369 Q. At seven o'clock?

A. That is right.

1370 Q. You made that entry before you got hurt?

A. Yes.

Mr. Hamer: There is no objection to the exhibit.

Plaintiff's Exhibit number 12 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

The Court: We will take a few minutes recess.

(Following recess hearing of the above entitled cause was resumed as follows):

Mr. Hamer: If the Court please, I ask leave to withdraw the statement I made of no objection and ask leave to ask one or two more questions concerning this exhibit.

The Court: All right.

Cross examination.

Continued by Mr. Hamer:

1371 Q. Mr. Ellis, during the time you had been foreman, and when you also had been an acting foreman, had you made these out before?

A. Yes.

1372 Q. And what do you do with them after you make them out?

[fol. 193] A. Turn them in to the yard office.

1373 Q. Do you know what the purpose is of making these records?

A. No, I don't.

1374 Q. Did the other formen make similar records?

A. Yes.

Mr. Hamer: No objection.

Plaintiff's Exhibit number 12 having been offered and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 193a.)

Plaintiff's Exhibit No. 12

Industrial

Form 2053

Station Argo Date 3/15 1923

Engine No. 4918 Foreman Ellis

Helper Brown Fuller

CAR				TAKEN		Time Out
Initial	Number			From	To	
TILP	11597	B	10	Argo	Bedford	5 50
L&N	59196	-	4	L	-	-
TILC	64397	-	-	-	-	-
Hyde	76555	-	-	-	-	-
L C	32476	B	10	Bedford	T.H.	6 45
L&O	39593	-	10	-	-	-
Range	123471	-	10	-	-	-
W P	13604	-	10	-	-	-
SP	32184	-	-	Clinton	T.H.	7 05

[fol. 194] Redirect examination.

Continued by Mr. Tautges:

1375 Q. From an examination of this record can you tell us, Mr. Ellis, what time it was that you got over to the car from which you took the number?

A. Seven o'clock in the evening.

1376 Q. Seven o'clock in the evening?

A. Yes.

1377 Q. This car that you took out of the Casein Spur track, will you read the record you made on that? Just read it to the Jury.

A. S. P., meaning Southern Pacific; Number 32684; Kind, box car; Loaded or empty, — loaded; From Casein Company to G. N., that is, the Great Northern. That means the Great Northern, and the time, seven o'clock P.M.

1378 Q. Now on this record there are eight other cars designated?

A. Yes.

1379 Q. What had been done with those cars?

A. We had left them out on the passing track in the Marginal Way.

1380 Q. After you picked up the car that you had to take off of the Casein Spur track, what were you going to do with that? If you had not been hurt, what would have been done?

A. We were going to take it to the Great Northern Transfer.

1381 Q. In making that move would you have delivered these other cars that are on the list?

A. Oh, yes, we would have taken them with us. We would have taken this out and would have picked up these other cars and have taken them with us.

[fol. 195] 1382 Q. What you were actually doing was engaging in the work of making up a train of cars you were going to move to somewhere else?

A. That is right. We had some more work to do in there for King County. I don't remember what it was.

1383 Q. At seven o'clock in the afternoon on that day can you tell us what the condition of the light was at that time?

A. It was the middle of March. It was one of the short days of the year. It would be getting dark or dusk.

Mr. Hamer: I move that the answer be stricken as not responsive and argumentative.

The Court: It may go out. It is not responsive.

Plaintiff excepts.

1384 Q. Just confine your answer to the condition of the light at that time of the day. How was that?

Mr. Hamer: If you recall.

A. Well, it was just before sunset, or right after sunset. It was getting dark.

1385 Q. Do you recall whether or not at the time you walked over to that car you had a lantern with you?

A. I don't think I had a lantern when I went after that car, no.

1386 Q. Now yesterday when Mr. Hamer was cross examining you, he brought out in substance from you that as you walked over there, as you approached the Casein Spur track and walked over to the east side of it, that you observed the tracks, the building, the curve and the distance of the track from the Casein Building. Did you at that time make any close or particular observation or inspection of that?

Mr. Hamer: Objected to as leading and suggestive; calling for a conclusion on the part of the witness and not a statement of fact.

[fol. 196] 1387 Q. Well, what is the fact as to whether or not, either at that time or at any other time before you were injured, you made any close or particular observation or inspection in relation to those matters?

Mr. Hamer: Objected to as leading and suggestive; calling for a conclusion on the part of the witness and not a statement of fact.

The Court: As to whether it was close or particular I suppose it calls for a conclusion, but he may answer the question.

Defendant excepts.

A. No, I never made any particular or close observation.

1388 Q. And at the time you walked over to the east side of the track, what if anything was your mind occupied with?

A. It naturally would be occupied with the work I was going to do, and getting it done and how I was going to do it.

1389 Q. I am not sure whether I have asked you this question or not, Mr. Ellis. Since you were injured have you

done any work of any kind, at which you have earned any money?

A. No, I have not.

1390 Q. Calling your attention to the checks which have been introduced in evidence showing the amount of money you earned or drew from the Union Pacific Railway Company from April, 1942, up to the time that you were injured, during the period of time that you were working for the Union Pacific Railway Company did you do any other kind of work at which you earned money?

A. Yes.

1391 Q. Tell us generally what that was.

[fol. 197] Mr. Hamer: Objected to for the reason that it is not within the issues of this case, and is irrelevant and immaterial.

Mr. Tautges: Well, it goes to the matter of his earnings, and his capability of earning.

Mr. Hamer: There are no allegations of any sort in the petition filed in this case that he had any earnings of any kind except from his employment with the railroad company. He hasn't claimed that he sustained any other loss of earnings.

Mr. Tautges: Well the allegation is that on account of his injury he has been prevented from engaging in any gainful occupation, and that his earning capacity was diminished.

The Court: I will overrule the objection.

Defendant excepts.

A. My father was building a house in Seattle. I helped him in the mornings, and on the days I was off.

1392 Q. And on such occasions as you were not putting in regular time for the Union Pacific, were you accustomed to doing other work at which you were capable of earning money?

Mr. Hamer: May I have the understanding that the same objection goes to this entire line of testimony?

The Court: Yes. Answer the question.

Defendant excepts.

A. Yes.

1393 Q. You testified yesterday, as I recall it, that during the month of February, 1943, there were four days that you didn't work for the Union Pacific.

[fol. 198] A. That is right.

1394 Q. Do you want to correct that testimony?

A. Yes, it was nine days.

1395 Q. There were nine days in February that you were off altogether from your duties with the Union Pacific?

A. Yes.

1396 Q. During those nine days were you engaged in other work?

A. That is right. I was.

1397 Q. And was that work at which you earned money?

A. Yes.

1398 Q. Approximately how much?

The Court: I think I would sustain the objection to that feature of the examination.

Plaintiff excepts.

1399 Q. Now taking your pay checks from the Union Pacific for the month of January, 1943, is it your claim or contention, Mr. Ellis, that you actually earned more on that job than you actually received from the company?

A. Yes.

1400 Q. Just tell us about that.

A. Well, I worked eleven 16 hour shifts, I believe it was. It was during a big snow storm in Seattle, and we had some argument as to the overtime that I received.

1401 Q. Did you put in a claim for the deficiency that you claimed?

A. I wrote — (interrupted).

Mr. Hamer: Objected to as immaterial, irrelevant, not within the issues of this case in any respect.

Mr. Tautges: Except for the purpose of showing that [fol. 199] his earnings were actually somewhat above what the check shows he received during the month of January, 1943.

Mr. Hamer: I haven't made any issue that he did not receive $360.00 for the month of January.

Mr. Tautges: Well, I will withdraw that.

Mr. Hamer: Well, I will say that he did earn $360.00 for the month of January. The net amount, as represented by the checks, is somewhat less than that.

Mr. Tautges: I think that is all.

Recross examination.

By Mr. Hamer:

1402 Q. Mr. Ellis, Mr. Tautges asked you on redirect examination about the manhole, and as I recall, you said you had not observed the manhole before you got hurt.

A. That is right.

1403 Q. Now let me ask you if at the time your deposition was taken if you were not asked this question by Mr. Tautges, and if you made this answer: (interrupted)

Mr. Tautges: What page?

Mr. Hamer: Page 69.

1404 Q. (continued). Question; "This manhole that you speak of, do you know whether you saw that before or since the time of the accident?" Answer; "Oh, I don't know whether I saw it before or not. I never thought anything about it before the accident. I noticed it since the accident, but before the accident, I don't know that I paid any particular attention to it, because I had never been in there only this once." Now what was the one time you had been in there that you were talking about at the time you made that statement, when you had observed the manhole?

[fol. 200] A. It was the time I saw it after the accident.

1405 Q. So you think it was after the accident, when you made the statement that you hadn't paid particular attention to it before the accident, because you had never been in there only this once?

A. I had never been in there before the accident.

1406 Q. Now the first time that you saw the impaired clearance sign was when?

A. It was in the summer.

1407 Q. Was it while you still had the cast on, or after the cast had been removed?

A. It was when I had the cast on.

1408 Q. So it would have been some time between the 22nd of June and the latter part of August?

A. That is right.

1409 Q. Are you able to fix the time any more definitely than that?

A. Well, I was going over to see Dr. Brown and on one of my trips over there the boys took me down in that locality and we examined it.

1410 Q. Was that the time you observed the fresh dirt around the pole?

A. I don't remember whether it was that time or not. I saw there was dirt around it, but I don't know that I observed it particularly at that time.

1411 Q. When was the time you observed the fresh dirt around the base of the pole?

A. I don't know.

1412 Q. You might have observed fresh dirt around it some time before the 15th of March, 1943?

A. No.

1413 Q. Well, when was it? Was it since the time you had the accident?

A. That is right.

[fol. 201] 1414 Q. And you were there on how many occasions?

A. Three or four times.

1415 Q. And the first time was between the 22nd of June and the latter part of August?

A. That is right.

1416 Q. When was the next time?

A. I don't know. I didn't keep no track of all the times I was there. Some time between the time of the accident and now.

1417 Q. Well, was it before you made the trip to Minneapolis?

A. Probably.

1418 Q. Do you think you were down there twice then between June and the first part of September?

A. Yes, no doubt I was.

1419 Q. When was the third time you were down there?

A. I couldn't say.

1420 Q. Do you remember the last time you were there?

A. The last time was just before the deposition was taken.

1421 Q. That was the day before the deposition was taken, wasn't it?

A. No, I don't believe, — well, it might have been the day before. It was a day or two before the day the deposition was taken.

1422 Q. You remember the deposition was taken on Monday, the 6th day of March?

A. Yes.

1423 Q. And you were there on Sunday, the 5th day of March, 1944?

A. Yes, we could have been. I don't remember.

1424 Q. That was one of the reasons you went down there wasn't it, because you knew your deposition was going to be taken and you wanted to go down and look over the ground to get the details of those things clearly in mind?

A. That is right.

[fol. 202] 1425 Q. And you can't tell this Jury now when it was you observed fresh dirt around the pole?

A. In the summer of 1943. I don't know the date.

1426 Q. What was the appearance of the dirt you observed?

A. Fresh dirt.

1427 Q. Was any grass growing in it at all?

A. No.

1428 Q. How far did that area of fresh dirt extend out from the pole?

A. Oh, about a foot around it. I couldn't say exactly. I didn't measure it.

1429 Q. Was there any pile of dirt any place?

A. No, not that I remember of.

1430 Q. How did it appear to be fresh dirt? What sort of appearance did it have in comparison with the surrounding ground?

A. Well, the surrounding ground was grass, long grass and short grass. Around that it was perfectly clean.

1431 Q. Was it tamped, this area of fresh dirt you are talking about?

A. No, I don't know as it was.

1432 Q. You say the pole appeared at that time to have been recently painted?

A. Yes, it even shows in the picture that it is like new paint.

1433 Q. Did it appear any brighter to you then than it had before?

A. I never had seen it before.

1434 Q. You don't want to leave the impression with the Jury, Mr. Ellis, that the pole had not been there before?

A. It had never been there to my knowledge.

1435 Q. By that you mean you had not seen it?

A. That is right.

[fol. 203] 1436 Q. Of course you had made no effort to try to see it, had you?

A. What is that question?

1437 Q. I say, you had made no effort to look for one at any other time had you?

A. What other time?

1438 Q. Well, from the first time you were down there.

A. The first time I was down there was when I got hurt.

1439 Q. You made no effort to look for it at that time?

A. No, I was nowhere near it.

1440 Q. Well, you didn't look for it?

A. No. It was in the wrong place anyway.

1441 Q. You don't want to say there never was one there?

A. I never saw it there.

1442 Q. You don't want to say it wasn't there?

A. It wasn't there before I got hurt.

1443 Q. You are certain of that are you?

A. No, I am not certain of it. I never seen it.

1444 Q. What did you discuss, — how did you find out, Mr. Ellis, that you had been mistaken in testifying that you was off four days in February?

A. Well, I got to thinking it over last night and thinking about what I had been doing, and I knew I was off more than four days. I was just making a guess at it.

1445 Q. Did you talk with anybody about that?

A. I did not.

1446 Q. You didn't have your book, your time book, did you?

A. No.

1447 Q. Did you reach that conclusion logically, from the fact that your earnings in February were less than what you thought they were?

[fol. 204] A. I didn't know what the earnings were in February. I was just guessing at it.

Mr. Hamer: I think that is all.

Redirect examination.

By Mr. Tautges:

1448 Q. Mr. Ellis, you testified on this last cross examination by Mr. Hamer that you were on your way to see Dr. Brown the first time that you noticed this sign. Is that right?

A. Yes.

1449 Q. Where was Dr. Brown located?

Mr. Hamer: Objected to as repetition, not proper redirect examination. He testified in his case in chief that he went to see Dr. Brown and Dr. McIlmore.

Mr. Tautges: Well you brought this out on your last cross examination.

The Court: I don't see how that could help us any. I will sustain the objection.

Plaintiff excepts.

1450 Q. Well, at that time you testified that two boys took you down there.

A. That is right.

1451 Q. Were those your boys?

A. Yes, sir.

1452 Q. Are they available as witnesses?

A. They are not.

1453 Q. Where are they?

Mr. Hamer: Objected to as immaterial.

The Court: Sustained.

Plaintiff excepts.

[fol. 205] 1454 Q. At any time after you saw this clearance sign, this impaired clearance sign, were any measurements made of that?

A. After I see the clearance sign were any measurements made?

1455 Q. Yes, at any time after you saw that impaired clearance sign.

A. Yes, I believe there were.

1456 Q. Were you present when they were made?

A. Yes.

1457 Q. Can you tell us how high the sign is above the ground?

Mr. Hamer: Objected to as no proper and sufficient foundation laid.

The Court: He says he was there when the measurements were made.

Mr. Hamer: Yes, but he doesn't way he participated in making the measurements.

The Witness: Yes, I did.

Mr. Hamer: Well, I didn't know that before, Mr. Ellis.

1458 Q. Well, tell us how high the sign is above the ground.

A. Eight feet, nine inches, above the ground.

1459 Q. How far is that sign located from the place where you were hurt, if you know?

A. Well, I will have to look on the map to see that.

1460 Q. I think that is probably indicated on the map.

A. (Witness steps before the map). Approximately forty feet.

1461 Q. Mr. Ellis, were any measurements taken from the nearest rail over to the foot of the wall of the building where you were hurt?

A. Yes.

1462 Q. What was that distance?

[fol. 206] A. I don't remember just what that was now. I could look at the engineer's plat, the plat we had made by the engineer. It shows on there.

1463 Q. Was that measurement taken while you were present?

A. Yes, it was.

1464 Q. And was it correctly jotted down on the plat?

A. That is right.

1465 Q. Calling your attention to Exhibit number 13, I will ask you to look at that and state whether or not that is the plat you refer to?

A. Yes, that is the plat.

1466 Q. Everything that is shown on that plat, did the engineer who was there make measurements of?

A. Yes.

Mr. Hamer: If the Court please, I think I will object to this as not being proper redirect examination. It is a matter that certainly should have been gone into in the case in chief. It looks like we are going to start trying the case again.

The Court: It would have been more proper in direct, but we will proceed with it.

Defendant excepts.

1467 Q. Does this plat also show the Casein Building and the Casein Spur track?

A. Yes, that is right.

1468 Q. And this old section of track, that is still in the Casein Spur track?

A. That is right.

[fol. 207] 1469 Q. Does it correctly show the surroundings, both to the west and east of that track?

A. Yes.

1470 Q. Does it show the paved driveway that is between the Casein Building and the Continental Can Company property?

A. Yes.

1471 Q. When was that plat made and the measurements taken? Maybe I can shorten that up. Were those measurements made or taken at the same time the photographs were taken that you have identified here and which have been put in evidence?

A. No, I don't believe they were. No, they were not. I don't remember the date these were made, but they were not made at the same time the pictures were. It was about a week after those pictures were taken. It was last month some time. I don't remember the date.

1472 Q. Well, how long before you came to Omaha for the trial?

A. About a month I imagine.

1473 Q. About a month before you came?

A. No.

1474 Q. Well, how long before?

A. I say about a month before I came back this time. Somewhere within a month. I don't know the exact date.

1475 Q. Well, was it some time in April this year?

A. Some time in March, I think.

1476 Mr. Tautges: Well, we offer in evidence the plat, Exhibit number 13.

[fol. 208] Mr. Hamer: I object for the reason that there is no proper and sufficient foundation laid for this, and also, it is not proper redirect examination. I thought as far as plats are concerned, Mr. Tautges, we had agreed on this one, (indicating Exhibit number 1), and I don't see any purpose in putting in another plat. If you went him to refresh his recollection from the measurements shown on that, since he says he was present when it was measured, I won't object to that on any ground except the ground that it isn't proper redirect examination.

1477 Mr. Tautges: Well, I will withdraw the offer and ask the witness this question.

1478 Q. Are you able to refresh your recollection from the plat as to the distance between the Casein Building and the nearest rail, at or in the vicinity of where you were hurt?

A. Yes.

1479 Q. By refreshing your recollection from the plat, can you tell us what that distance is?

A. Four feet and seven inches.

1480 Q. Mr. Ellis, can you tell us approximately the amount of overhang there is on a box car when it is standing on a straight, level track?

A. About twenty-four inches, I would think.

1481 Q. This Casein Spur track, was that what is known as a standard gauge track?

A. Yes.

1482 Q. Can you tell us the distance or space there is from one rail over to the other rail in a standard gauge track?

A. I believe it is fifty-eight and a half inches. It is fifty-[fol. 209] six and a half, or fifty-eight and a half, I don't remember exactly.

Mr. Tautges: Can we agree, Mr. Hamer, that the standard gauge track is four feet, eight and a half inches?

Mr. Hamer: Yes, from inside rail to inside rail.

The Court: Between the insides of the rails?

Mr. Hamer: Yes, that is the gauge between the rails.

1483 Q. On a railroad track such as this is, can you tell us what the width of the top of the rail is, approximately?

A. Two and a half or three inches.

Mr. Tautges: I think that is all.

Recross-examination.

By Mr. Robert Hamer:

1484 Q. Did you ever measure the overhang of those box cars?

A. I never did.

1485 Q. Do you know that some box cars overhang more than others?

A. No, I never measured any. Yes, I guess there are larger box cars.

1486 Q. All box cars aren't the same width are they?

A. No.

1487 Q. During the course of your experience you have observed varying widths of box cars, haven't you?

A. Well, I never paid any particular attention to it.

1488 Q. Well, you have noticed that?

A. I noticed some were longer, and some were wider probably.

1489 Q. Than others?
A. Yes, sir.
[fol. 210] Mr. Hamer: That is all.
Mr. Tautges: That is all.
Witness excused.
The Court: We will adjourn until 1:30 this afternoon.
(Court reconvenes at 1:30 P. M., pursuant to adjournment, and hearing of the above entitled cause is resumed as follows):

[fol. 211] Mr. Donald H. Christensen, called as a witness, on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tautges:

1490 Q. What is your full name?
A. Donald H. Christensen.
1491 Q. Where do you reside?
A. Seattle, Washington.
1492 Q. What is your age?
A. Twenty-nine.
1493 Q. Did you come from Seattle, Washington, to Omaha, for the purpose of testifying as a witness in behalf of the plaintiff?
A. That is right.
1494 Q. What is it? Did you come from Seattle to Omaha to testify as a witness for the plaintiff?
A. Yes.
1495 Q. When did you arrive at Omaha?
A. Last Saturday morning.
1496 Q. What is your business or occupation at Seattle?
A. I work for the Union Oil Company.
1497 Q. How long have you been in the employ of the Union Oil Company?
A. Approximately one year.
1498 Q. Were you at one time in the employ of the Union Pacific Railroad Company?
A. That is right.
1499 Q. In what capacity were you employed by the Union Pacific?

A. As a switchman and brakeman.

1500 Q. Where were you employed by the Union Pacific?

A. In the Argo Yards.

[fol. 212] 1501 Q. In Seattle, Washington?

A. That is right.

1502 Q. Have you heard the testimony given by Newton Ellis in this case?

A. Part of it.

1503 Q. How long have you been acquainted with the plaintiff Ellis?

A. Well, that would be pretty hard to say exactly. I never knew him before I went to work there.

1504 Q. What is that?

A. I met him some time after I went to work for the Union Pacific Railroad Company.

1505 Q. At the time you met him was he also employed by the Union Pacific Railroad Company?

A. That is right.

1506 Q. Did you hear the testimony with respect to Mr. Ellis being injured between the Casein Spur track and the Casein Building?

A. I heard part of it.

1507 Q. Are you familiar with that location?

A. To a certain extent, yes.

1508 Q. Have you worked in and about those tracks?

A. Yes, I have.

1509 Q. When you worked in and about those tracks were you working for the Union Pacific Railroad Company?

A. That is right.

1510 Q. When did you first learn that Mr. Ellis, the plaintiff, had been injured?

A. Well, I heard it that evening when I came to work. If I remember correctly, I came to work on the 10:30 shift.

1511 Q. And that was March 15, 1943, was it?

[fol. 213] A. Well, as far as I know, that was the date.

1512 Q. Well, assuming that that was the date, had you worked in and about this Casein Spur track and the Myrtle Street track in the period within a few days prior to the time that Ellis was hurt?

A. Well, I had been in there at different times and I believe, as close as I can recollect, I probably was in there with them maybe a week before that or ten days, something like that.

Mr. T. F. Hamer: I move to strike the answer as not responsive and speculative.

Mr. Tautges: I think that is responsive.

The Court: We will let it stand.

Defendant excepts.

1513 Q. Now then, after March 15, 1943, after you learned that Mr. Ellis had met with an accident or injury, did you work in and about that track after that?

A. Well, in approximately a week we was down there,—not direct into Casein Spur, but we went in to the Myrtle Street track.

1514 Q. In the course of your employment with the Union Pacific had you had occasion to work in on the Casein Spur track?

A. Yes, I had.

1515 Q. On those occasions that you worked in on the Casein Spur track in March, 1943, can you tell us what the condition of the ground was in there, and the condition of the tracks and ties of that Casein Spur track?

Mr. T. F. Hamer: Objected to as immaterial in the present state of the record.

The Court: Overruled.

Defendant excepts.

Mr. Hamer: The question is whether you can tell.

A. Well, the ground is damp. The grass is "pinnear" always wet there unless the sun happens to shine. Outside [fol. 214] of that, it is quite mucky, not a real solid bottom to it.

1516 Q. What did you observe with respect to the condition of the track and the ties along that Casein Spur?

A. Well, you have tracks there narrower than the others,—the rails themselves I mean. The rails have been in there a long time. They didn't seem to be too solid and some parts there were higher than the others.

1517 Q. Had you observed cars being moved in and off the Casein Spur track?

A. Yes, I had.

1518 Q. Tell the Court and Jury what you observed with respect to the action or the movement of the cars as they were moved in and off of that Casein Spur track where it runs along the Casein Building.

Mr. T. F. Hamer: Objected to as immaterial, inasmuch as it refers to some time other than the time of the accident and to some movement other than the movement that is involved in this case.

The Court: Overruled. He may answer the question.

Defendant excepts.

A. Well of course when you are head brakeman or pin puller you stay out of the switch. Of course that means when the car is going into the Casein Spur you would naturally observe it or watch it back in. Well, it rocks back and forth, the engine and the car also, seeing that the track is rough.

1519 Q. Did the cars do that when they were being moved at a slow rate of speed in and off that track?

[fol. 215] Mr. T. F. Hamer: Objected to as immaterial, inasmuch as it refers to some time other than the time and to some movement other than the movement that are involved in this case.

The Court: Overruled.

Defendant excepts.

A. Well, they would.

1520 Q. In Seattle, and in that country generally, is there a rainy season out there?

A. That is right.

1521 Q. Over what months does that extend?

A. Well, I would say from around about the first of December, approximately, until the latter part of April.

1522 Q. During that period of time to what extent is there either snow or rain or moisture generally?

Mr. T. F. Hamer: Objected to as immaterial unless it is confined to the time, or near the time, that is involved in this case.

The Court: Sustained.

Plaintiff excepts.

1523 Q. What was the condition in the month of March, 1943 as to the moisture, say immediately before March 15, 1943?

A. That was about the normal rainfall.

1524 Q. What is that?

A. That was a normal month for rainfall.

Mr. T. F. Hamer: I move to strike the answer as not responsive and indefinite.

The Court: Answer the question.

Defendant excepts.

[fol. 216] 1525 Q. The question is whether or not, either on March 13, 1943, or for a few weeks prior to that time, was there any moisture or rainfall at and in the vicinity of this Casein Building and *and* Casein Spur track?

A. Well, yes, we had rain, but as far as the actual date, whether it was the twelfth or thirteenth,—(interrupted).

Mr. T. F. Hamer: Just a minute. You have answered the question. You had rain.

1526 Q. Well, take it during the rainy season which you have said extends from about the first of December to the latter part of April, can you tell us whether or not it is generally wet and damp in and about the vicinity of this Casein Spur track?

Mr. T. F. Hamer: Objected to as immaterial for the reason that the inquiry covers a long period prior to the date of the accident and a considerable period subsequent thereto.

The Court: Sustained.

Plaintiff excepts.

1527 Q. Now then Mr. Christensen, when you have observed cars moving either in or off of the Casein Spur track have you noticed or observed whether or not there was any tendency for the track or the rail, particularly next to the Casein Building, to sink down to some extent?

Mr. T. F. Hamer: Objected to as immaterial and too broad. It tends neither to prove or disprove any issue in this case.

The Court: Overruled.

Defendant excepts.

[fol. 217] A. Yes, it had a tendency to lean toward the Casein Building itself.

1528 Q. There has been some testimony introduced here as to an impaired clearance sign being at a point a short distance northwest of the northwest corner of the Casein Building. Did you hear that testimony given here in court?

A. The question isn't quite clear. I don't quite follow you there.

1529 Q. (Read by reporter). There has been some testimony introduced here as to an impaired clearance sign

being at a point a short distance northwest of the northwest corner of the Casein Building. Did you hear that testimony given here in Court?

A. Yes, I did.

1530 Q. Calling your attention to Defendant's Exhibit number 11, I will ask you to look at that and state whether or not you recognize what is shown in that picture?

A. That is right. I recognize what is there.

1531 Q. Just a little louder, please.

A. Yes, I recognize this picture. I don't recognize the picture, but I recognize the surroundings shown there.

1532 Q. In this picture is shown a post with a sign attached to it, on which are the words "Impaired clearance". Have you at any time observed that sign?

A. Yes, I did.

1533 Q. When did you first observe that sign?

A. Well, it wasn't until after the accident, some time along, I would say some time along in May.

[fol. 218] 1534 Q. When you worked in there about the Casein Spur track, both before March 15, 1943, and say within a week or two after March 15, 1943, had you ever observed that sign?

A. No, I hadn't.

1535 Q. While you were working as a switchman for the Union Pacific Railroad Company, in and about the vicinity of the Casein Spur track, and prior to March 15, 1943, had anyone ever called your attention to the fact that there was such a sign there?

Mr. T. F. Hamer: Objected to as immaterial.

The Court: Overruled.

Defendant excepts.

A. No.

1536 Q. Will you describe to the Court and Jury the condition and the appearance of that sign, and the post, and the ground around the base of the post, that is, where the post was set in, at the time you first observed it?

A. Well, the post itself was a newly painted post.

1537 Q. Just a little louder, please.

A. The post was new and the ground surrounding it had been freshly turned a short time before that. It was up in a little hill right around the post where it had been tamped down and hadn't become level with the rest of the surrounding dirt around it. The sign itself was newly painted; the

white was shiny and the words "Impaired clearance" were fresh. It wasn't fresh, it was newly painted. The bolts that hold the sign board to the post didn't show any sign of wear or rust of any kind.

Mr. Tautges: I think you may cross examine.

[fol. 219] Cross-examination.

By Mr. T. F. Hamer:

1538 Q. Where do you live at present, Mr. Christensen?

A. In Seattle, Washington.

1539 Q. How are you employed at present?

A. By the Union Oil Company.

1540 Q. How long have you had that employment?

A. You will have to speak a little louder. I am a little bit hard of hearing.

1541 Q. How long have you had that employment by the Union Oil Company?

A. Approximately a year.

1542 Q. That is, since about May of 1943?

A. I went to work for them in June, the first part of June in 1943.

1543 Q. And what was your work up until the time you went to work for Union Oil?

A. I had done different kinds of work. At one time I worked a little off and on for the Northern Pacific.

1544 Q. Well, in the month of June, before you went to work for Union Oil, what were you doing?

A. I went to work for them the third day of June.

1545 Q. Well, in the month of May what were you doing?

A. Working for the Union Pacific Railroad Company

1546 Q. Up until what time?

A. Up until the latter part of May. I don't know exactly the date but I would say around possibly the 26th or 27th, something like that.

1547 Q. And what was your position?

[fol. 220] A. As a switchman.

1548 Q. And where were you working the latter part of May?

A. At the Argo Yards, in Seattle.

1549 Q. Was that yard work or industrial work?

A. Both.

1550 Q. Was that true in the forepart of May?

A. That is right.

1551 Q. And how about the month of April?

A. That is right.

1552 Q. And through the month of March?

A. That is right.

1553 Q. Did you come here on the business of the Union Oil Company?

A. No, I didn't.

1554 Q. For what purpose did you come?

A. Mr. Ellis asked me if I would come down to testify to what I knew.

1555 Q. When did he ask you to come and testify?

A. Oh, I would say about a week or ten days before I came down here.

1556 Q. And you got here last Saturday?

A. Yes.

1557 Q. Had you talked with Mr. Tautges before coming?

A. I never met him before.

1558 Q. You never met Mr. Tautges until you got here?

A. No, sir.

1559 Q. Who paid your expenses down here?

A. Nobody has paid them yet.

1560 Q. Well, are you looking to somebody to pay them?

[fol. 221] A. Well, Mr. Ellis told me he would pay my railroad fare and hotel, and I never expected any other reimbursement.

1561 Q. Did you make any arrangement about any other compensation?

A. No, sir, nothing was ever mentioned.

1562 Q. Now you tried to tell something about the weather during the month of March. Were there any rains in March, prior to the 15th?

A. I would say there was, yes.

1563 Q. Heavy rains?

A. There may have been heavy rains and there may have been light rains.

1564 Q. Well, were there heavy rains during the month of March, up to the 15th? Do you have any recollection of them?

A. That is quite a long time ago.

1565 Q. Well, you are not answering my question. Do you have any recollection of them?

A. Well, I couldn't say there was, or I couldn't say there wasn't.

1566 Q. In other words, you don't know about it?

A. Well, not that definite.

1567 Q. During the month of February you were there, working for the Union Pacific?

A. That is right.

1568 Q. And was that in the Argo Yards, as a switchman?

A. Industrial, and in the yards themselves.

1569 Q. Were you a foreman?

A. No, I was a helper.

[fol. 222] 1570 Q. And sometimes you worked, I take it, as field man and sometimes as pin puller?

A. That is right.

1571 Q. In fact, that is the way a crew usually works isn't it; some of the time a man will work in one capacity and some of the time he will work in another?

A. Well, most generally the senior man works the field.

1572 Q. Usually the senior man works the field?

A. Yes, sir.

1573 Q. And the junior man is the pin puller?

A. That is most generally the rule.

1574 Q. That is not an unvarying rule, or is it?

A. Well, it could be. Some of the older men don't like to do the walking that the field man has to do, and naturally would follow the engine and pull pins.

1575 Q. The pin puller has less walking to do than the field man has to do, is that right?

A. That is right.

1576 Q. The field man is the fellow who works out ahead, no matter which way the engine is facing, he is the fellow who works out in the field, up to the movement that is going to be made?

A. Well, no, he may be right at the engine itself. If the foreman is just going out to find out what he is going to do, he may be right at the engine until a definite move is going to be made.

1577 Q. Well, you ordinarily distinguish don't you between the field man and the pin puller, and the distinction has reference to the kind of work they do. That is right isn't it?

A. That is right.

1578 Q. How would you classify the sort of work they do?

[fol. 223] A. Well, lots of times, if he is a good, experienced field man, the foreman may possibly send him down in there to pick out the car and not even bother to go there

himself. If he is an inexperienced man, he will have to go down with him to pick out the car.

1579 Q. Would I be right by putting it this way. If I say the pin puller usually works close to the engine and the field man is down there in the yard somewhere, ahead of the work that is going to be done,—(interrupted).

A. The pin puller always stays in sight of the engineer.

1580 Q. And the field man is down near where some cars are going to be picked up, or he is down stopping cars, doing things of that kind. Is that right?

A. That is right.

1581 Q. How often had you been in on this spur, the Casein Spur, say in the month preceding the time you heard of Mr. Ellis' accident?

A. You mean before?

1582 Q. Yes, before.

A. Before he was hurt?

1583 Q. Yes.

A. Oh, maybe once.

1584 Q. Do you remember what that movement was, what it was that took you in?

A. No, I don't remember. It was to pick up a car. I don't remember what car it was.

1585 Q. You don't remember whether it was to pick up a car or set one out, do you?

A. Not definitely.

[fol. 224] 1586 Q. Do you remember whether you were the field man or the pin puller?

A. If I remember correctly, at that time, — well, I wouldn't say definitely.

1587 Q. I am speaking now with respect to this movement, not what you were during the period, but what you were with respect to the movement when you were in there once in the month preceding the injury.

A. Well, I imagine I probably was — (interrupted).

1588 Q. No, I don't want what you imagine. I don't want you guessing at it. I want to know what you know.

A. I would say a pin puller.

1589 Q. Is that your memory of it? Do you have a memory of being in there as a pin puller?

A. As far as I can remember.

1590 Q. Well, as pin puller what duty did you have to perform in on the Casein track?

A. Well, I would throw the switch and let the engine back in.

1591 Q. That is, you would throw the switch?

A. The Casein switch.

1592 Q. Here on the Myrtle Street track, for the purpose of letting the eigine and car, if there was a car to be spotted, or the engine if it was simply going in after a car, to go in on the spur?

A. Yes.

1593 Q. And you remained there at the switch, I take it?

A. Well, not necessarily.

1594 Q. Well, what is your recollection of what you did?

A. Well, I might have walked down this track.

[fol. 225] 1595 Q. I am not asking what you might have done. Do you have any memory of what you did? I don't want you to speculate on it. I want to know what you know about it. If you know, tell me what it was; if you don't know, say so.

A. Well, I couldn't say definitely.

1596 Q. Now then, in the month before that, that is, the second month or thereabouts before Mr. Ellis was hurt, did you do any switching that took you in on the Casein Spur?

A. Well, as far as making any definite, specific time — (interrupted).

1597 Q. You can't say that you did.

A. No, I might have and I might not have been in there.

1598 Q. How about the third month?

A. Well, that is a long time ago.

1599 Q. Well then, you can't say?

A. Well, I know I have been in there three or four times.

1600 Q. You know you have been in there at some time?

A. That is right.

1601 Q. But you don't know when?

A. Not all the times, I don't recollect.

1602 Q. Can you tell me definitely any one time?

A. I was in there some time before he was hurt, I know that.

1603 Q. Can you tell me definitely when it was?

A. Not exactly the date.

1604 Q. Can you tell me within a month of when it was?

A. Probably a week or ten days, approximately.

[fol. 226] 1605 Q. A week or ten days, approximately of what?

A. Before he was hurt.

1606 Q. Can you tell me who you were with? Who was your crew?

A. No, I can't.

1607 Q. You can't remember your foreman?

A. It probably was Mr. — (interrupted).

1608 Q. No, I am asking you if you can remember.

A. Not definitely.

1609 Q. Can you remember your other helper?

A. If I could remember the foreman I could remember the helper.

1610 Q. Well, you can't remember the helper then?

A. No.

1611 Q. Can you remember the engineer?

A. I wouldn't have any reason for remembering the engineer.

1612 Q. Well, I am asking whether you can or not. Can you remember the engineer?

A. No, I can't.

1613 Q. Or the fireman?

A. No.

1614 Q. Now did you say that it was within a week before the time that Mr. Ellis was hurt that you were in there?

A. From a week to ten days.

1615 Q. What time of the day was it?

A. In the morning.

1616 Q. You say that because that was your usual shift, or do you remember that?

A. No, it would have to be that, because I was on the 10:30 job at night, and I was doubling, and I was down at those places most of the time later.

[fol. 227] 1617 Q. You went to work at 10:30 at night?

A. That is right.

1618 Q. And you would ordinarily work until 4:30 in the morning?

A. Until 6:30 in the morning.

1619 Q. Yes, 6:30 in the morning.

A. That is right.

1620 Q. Now was it within that stretch of time that you were in on this track?

A. No.

1621 Q. Well, what period of time would it be?

A. Well, I doubled over on to what they call the 7:30 shift, that went to work at 7:30 in the morning.

1622 Q. Was that the usual thing with you, or was it a little out of the ordinary?

A. It all depended on how short of men they were.

1623 Q. How was it at that time?

A. They were very short of men.

1624 Q. But was it a usual or an unusual thing at the time you did that?

A. Right at the present time you mean when I — (interrupted).

1625 Q. I am asking you with respect to the time, which you say was a week or ten days before Mr. Ellis was hurt, that you say you were in on the Casein Spur, and you talked about doubling over. I am asking you whether that was the usual or unusual thing at that time.

A. I don't quite follow that question.

1626 Q. (Read by reporter). I am asking you with respect to the time, which you say was a week or ten days before Mr. Ellis was hurt, that you say you were in on the Casein Spur, and you talked about doubling over. I am [fol. 228] asking you whether that was the usual or unusual thing at that time.

A. Well, you would double almost any time you were working there after I came to work, because they were always short of men.

1627 Q. Well, then, it was not an unusual thing for you to do. Is that right?

A. That is right.

1628 Q. Where were you when you heard of Mr. Ellis' injury? Where were you working?

A. I was working in Argo Yards proper, itself, right in the yards.

1629 Q. Do you remember from whom you heard it?

A. I believe it was the night yardmaster.

1630 Q. What time of the day was it?

A. Well, it was about, — it would be between ten and ten-thirty in the evening.

1631 Q. Who was the night yardmaster from whom you heard it?

A. Milo, — I can't remember his last name.

1632 Q. Did you talk to anybody about it? Did you have any conversation about the manner of his injury or where he was hurt?

A. No, he just — (interrupted).

1633 Q. I am asking whether you talked to anyone. Did you say anything about the manner of his injury or where he was hurt?

A. No, I didn't.

1634 Q. When did you first talk to anybody about the condition of this track you have testified to?

A. Well, I guess it would be right now.

1635 Q. Never from the time that you learned of Mr. Ellis' injury until you were called here as a witness and told us from the stand, have you ever said anything to anybody about the condition of the track?

[fol. 229] A. We might have talked, — when he was working there we might have talked about it.

1636 Q. Well, did you?

A. Well I wouldn't say I did, or I wouldn't say I didn't.

1637 Q. Have you any recollection of anybody you ever talked to about the condition of this track until you came here as a witness and told us about it?

A. Well, not that I know of definitely, no.

1638 Q. Well, am I safe in saying you didn't talk to anybody about it?

A. Well, I am not sure that I did or did not.

1639 Q. When did you first tell anybody that you hadn't, when you were in there, noticed the impaired clearance sign?

A. That I never had noticed one?

1640 Q. Yes, when did you first tell anybody that?

A. Sitting right here.

1641 Q. Right here on the stand?

A. That is right.

1642 Q. Up to that time you had imparted that information to no one?

A. Not that I know of.

1643 Q. When did you first tell anybody that some time in May, when you were around there, you noticed that the sign was freshly painted? When did you first tell that? Was that here too?

A. I imagine I told Mr. — (interrupted).

1644 Q. No, I don't want you imagining. I want you to tell who it was, if you told it to anyone at all.

A. I probably told Mr. Ellis when he came and asked me if I knew anything about it.

1645 Q. He came to you, or did you come to him?

[fol. 230] A. He came to me and asked me if I knew anything about it.

1646 Q. When was that?

A. About a week or ten days before we came down.

1647 Q. Did you have any desire for a trip to Omaha?

A. Boy, if you rode these trains you wouldn't,—(interrupted).

1648 Q. Tell me, yes or no, did you have any desire for a trip to Omaha?

A. No, I didn't.

1649 Q. Do you have any people here?

A. No.

1650 Q. No friends or acquaintances?

A. I don't know anybody here.

1651 Q. Who do you have close to Omaha, that is, a relative, friend or acquaintance?

A. I don't have any close relatives or friends.

1652 Q. All right, we won't say any close relatives, but who do you have that you might be related to?

A. Not within eight hundred or nine hundred miles.

1653 Q. Where are they?

A. Up in the northern part of Minnesota.

1654 Q. Do you expect to go there when you leave here?

A. No, I don't, but I have an invalid mother, and I would like to.

1655 Q. Where is she?

A. Up in northern Minnesota.

1656 Q. Then if I get it right, and let me be sure about this, you didn't tell anybody about the fact that you had never noticed an impaired clearance sign there, until you were called here and testified, but you did tell Mr. Ellis, for the first time that you mentioned it to anyone, about a week ago, that when you were there in May you noticed [fol. 231] there was a sign freshly painted. Am I right in summing it up that way?

A. Do you mean — (interrupted).

1657 Q. Well, I want you to answer my question. You can answer that yes or no.

A. I don't quite understand that question. That is the trouble.

1658 Q. (Read by reporter). Then if I get it right, and let me be sure about this, you didn't tell anybody about the

fact that you had never noticed an impaired clearance sign there, until you were called here and testified, but you did tell Mr. Ellis, for the first time that you mentioned it to anyone, about a week ago, that when you were there in May you noticed there was a sign freshly painted. Am I right in summing it up that way?

A. I believe that is correct.

1659 Q. How long have you known Mr. Ellis?

A. Well, I knew him from working there, that is all.

1660 Q. How frequently did you see one another?

A. Maybe we wouldn't see each other for a week, maybe a month. Maybe I would see him every day for a couple of days.

1661 Q. Well that was during the period you were working was it, that you saw him that frequently, or has it been since that time?

A. I never saw him before I worked with him, and I haven't seen him since then up until a week or ten days ago.

1662 Q. You quit work there in June, did you?

A. The latter part of May.

1663 Q. During the summer of 1943 did you see Mr. Ellis?

A. No, I didn't.

1664 Q. You didn't go to the hospital to see him?

[fol. 232] A. To the hospital?

1665 Q. Yes.

A. No.

1666 Q. Did you see him after he was out of the hospital?

A. No, not until a week or ten days ago.

1667 Q. And then he came to you?

A. That is right.

1668 Q. And you hadn't told anybody about it up until he came to you?

A. About what?

1669 Q. About these things you have testified to?

A. I didn't have no occasion to talk about them.

1670 Q. Did you go with him to see anybody else?

A. No, sir, he came to the place where I work.

1671 Q. Did you learn how he knew you were working there?

A. He told me something about somebody telling him. I don't remember who it was.

1672 Q. And he came to you to help him?

A. He came and asked me what I knew.

1673 Q. Did he seem to know that you would be able to furnish him with some information?

A. No, he didn't. He didn't even act like he did.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

1674 Q. Well now Mr. Christensen, after you arrived in Omaha and while this trial has been in progress, you have talked with Mr. Mecham and I about the matter, have you not?

A. Some phases of it.

[fol. 233] 1675 Q. That is, Mr. Mecham and I questioned you as to what, if anything, you knew about the facts?

Mr. Hamer: Objected to as an effort to lead, and to impeach the testimony of their own witness.

Mr. Tautges: I am not seeking to impeach the witness, but to explain the matter.

The Court: Overruled.

Defendant excepts.

A. Well, there might be some things you might have asked me. I don't know just what it was, or anything.

Mr. Tautges: I think that is all.

Recross examination.

By Mr. T. F. Hamer:

1676 Q. You say your mother lives in northern Minnesota?

A. That is right.

1677 Q. What is the town?

A. At Bemidji.

1678 Q. That is north of Brainerd, isn't it?

A. About a hundred and some miles, I don't know exactly.

Mr. Hamer: That is all.

Mr. Tautges: That is all.

Witness excused.

[fol. 234] MR. JAMES HOMER ELLIS called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tautges:

1679 Q. Mr. Ellis, what is your full name?

A. James Homer Ellis.

1680 Q. Where do you live?

A. Seattle.

1681 Q. Washington?

A. Yes, sir.

1682 Q. How long have you lived out there?

A. Well, I have lived there the last six years. I have been around Seattle, over there and near there, working there, and back and forth to Bremerton, for about twelve years.

1683 Q. How old a man are you?

A. I am seventy-eight.

1684 Q. Are you the father of Newton W. Ellis, the plaintiff in this case?

A. Yes, sir.

1685 Q. What has been your business or occupation since you have lived in Seattle?

A. Well, I have been in the carpenter business most of the time.

1686 Q. Have you at any time lived in this part of the country?

A. Yes. I never lived in Omaha. I lived in Lincoln one year, and I was born in Iowa.

1687 Q. When did you first learn that Newton had been injured?

A. Well, the night he got hurt I got home about eight o'clock and they told me that he had got hurt.

1688 Q. That is, you got the information about eight o'clock in the evening of the day that he got hurt?

A. Yes.

[fol. 235] 1689 Q. Had you, yourself, been engaged in some work before you went home?

A. I was building a house up on Phinney Avenue.

1690 Q. How late did you work?

A. Well, I worked every day as long as I could see.

1691 Q. Can you tell us what the condition was as to light or darkness at seven o'clock in the evening of March 15, 1943?

Mr. T. F. Hamer: Objected to as immaterial to any issue in this case. There is no claim here of any insufficient light.

The Court: I will sustain the objection. I don't think it makes any difference.

Plaintiff excepts.

1692 Q. Do you know what the condition of the light was at seven o'clock in the evening of March 15, 1943?

Mr. T. F. Hamer: Just whether you know or not.

A. I have to talk if I tell it.

Mr. T. F. Hamer: Well, whether you know simply calls for a yes or no answer.

1693 Q. That is, outdoors.

A. Well, it was just about dark.

Mr. T. F. Hamer: I move to strike the answer as not responsive.

The Court: Sustained. Just answer yes or no to that question, — do you know?

Plaintiff excepts.

A. Yes.

1694 Q. What was the condition of light out doors at that time of day?

[fol. 236] Mr. T. F. Hamer: Objected to as immaterial to the issues of this case. There is no allegation of any deficiency in light.

The Court: There is no allegation as to light, but he may answer the question.

Defendant excepts.

A. Just about dark.

1695 Q. Now after you learned your son had been injured, did you go to see him?

A. Yes, sir.

1696 Q. Where did you go?

A. I went to the Providence Hospital.

1697 Q. That was located where?

A. Well, I don't believe I can tell. I don't know exactly.

1698 Q. Well, it was in the city of Seattle, was it?

A. Yes, sir, in the southeast part of Seattle.

1699 Q. When you arrived at the hospital did you see Newton?

A. Yes, sir.

1700 Q. Where was he at that time?

A. He was on a cot or a bed.

1701 Q. What was his condition at that time as you observed it?

A. Well, he seemed to be pretty badly — (interrupted).

1702 Q. Just a little louder, please.

A. I say, he seemed to me to be hurt pretty badly.

1703 Q. Can you describe what he appeared like?

A. Well, that night he didn't talk. He said it hurt him to talk and I didn't ask any questions after that, because if it hurt him to talk, I didn't want him to do it. It was an effort for him to talk, anyway.

[fol. 237] 1704 Q. How long were you with him at that time?

A. Well, something like two hours.

1705 Q. During that time was he conscious all of the time, or not?

A. Well, I wouldn't know. He didn't do much talking and we never talked to him after he said it hurt him to talk.

1706 Q. During that period of time that you were there, did he have the attention of either a doctor or a nurse?

A. There was a nurse in the hospital. There wasn't any doctor there.

1707 Q. During that period of two hours that you were there on the night of the day of the accident, did he show any evidence of any kind of being in pain? In other words, did he make any exclamations or sounds of any kind?

A. Well, not so much. Of course he breathed hard and seemed to be in some pain. Of course I couldn't tell anything about it, because he wouldn't talk. He seemed to be more kind of unconscious.

1708 Q. Did you see him again the next day?

A. Yes, I went down the next day about noon.

1709 Q. Did you see him every day while he was in the hospital the first five or six weeks after the day of the accident?

A. I saw him every day, and sometimes twice a day.

1710 Q. Now then, during that period of time will you tell the Jury what his condition was as you saw it and observed it?

Mr. T. F. Hamer: I think I will object to that as calling for a conclusion. He can tell, of course, what he saw.

Mr. Tautges: That is what I am asking for, his observation.

Mr. Hamer: Well, I don't just get it that way. You asked him what his condition was.

[fol. 238] 1711 Q. Well, tell the Court and Jury how he appeared, as to either being helpless or suffering pain, or otherwise.

A. Well, he was breathing very short when I came back there next day, and he continued to do that. He said the doctor had promised to come — (interrupted).

Mr. Hamer: Just a minute, I move to strike that part beginning with "He said", as not responsive and hearsay.

1712 Q. No, what I want you to describe, Mr. Ellis, is his condition and appearance as you saw him. In other words I want you to give the Court and Jury a picture of your boy as he was in the hospital.

A. Well, he was breathing very short when I got there. I expected it to be his last breath.

Mr. Hamer: I move to strike that part of the answer beginning with "I expected" as a conclusion and not responsive.

The Court: The record may stand.

Defendant excepts.

1713 Q. During every occasion that you saw him while he was in the hospital, did he appear to you to be sick?

A. Yes, he certainly did.

1714 Q. Did he appear to you to be suffering or not?

A. He sure did seem to be suffering.

1715 Q. Now during the part of the time that he was in the hospital do you know, or were you so advised by those in charge of him, as to whether or not he had pneumonia?

A. I couldn't say that anyone said that to me.

[fol. 239] 1716 Q. What is that?

A. I couldn't say that they mentioned pneumonia to me.

1717 Q. Were you present at any time when he was given sulfa drugs?

A. Yes, sir.

1718 Q. Who administered those?

A. Well, the nurse did when I saw it.

1719 Q. Were you present at any time when they used oxygen?

A. Yes, sir.

1720 Q. And how was that supplied to him?

A. Well, through a tube into his mouth, I think.

1721 Q. Were you present at any time when they as-

pirated him, that is, removed fluid or phlegm from his throat or chest?

A. No, I wasn't.

1722 Q. Now do you remember when your son came out of the hospital the first time?

A. Yes.

1723 Q. Did you see and observe him at that time?

A. Yes, sir.

1724 Q. Can you tell us whether or not he appeared to have lost weight?

A. Yes, he had lost considerable weight.

1725 Q. After he came out of the hospital the first time was he taken to his home at Port Orchard?

A. Yes, sir.

1726 Q. Did you visit him there?

A. Yes, sir.

1727 Q. What was his condition at home when you saw him and observed him?

A. Well, he laid in bed all the time. He was in very bad shape.

[fol. 240] 1728 Q. And then later on, do you know anything about the operation that was performed?

A. I didn't see it.

1729 Q. What is it?

A. I didn't see the operation.

1730 Q. Well did you see him in the hospital while he had that operation?

A. Yes, sir.

1731 Q. Do you recall how long he was in the hospital after that operation?

A. Well, I couldn't say exactly, something like four weeks, or six weeks.

1732 Q. Did you notice or observe the cast that was applied to him?

A. Yes, sir.

1733 Q. Can you describe that to the Jury?

A. Well, he had a cast around his chest here, and he also had one on this arm, (indicating) and had a brace in under here, (indicating) that held his arm up like that. (indicating).

1734 Q. Do you recall how long he wore that?

A. No, I don't know. About a month I guess, or six weeks.

1735 Q. Now before Newton met with this injury that he suffered on March 15, 1943, what was his condition as you observed it as to being a strong, well, healthy, able bodied man?

A. He certainly was a strong man.

1736 Q. Did you sometimes work with him, or did he sometimes work with you?

A. He plastered for me.

1737 Q. Now since Newton was hurt has he done any work for pay to your knowledge?

[fol. 241] A. Not that I know of.

1738 Q. Does he appear as well to you as he did before he was hurt?

A. Oh, I should say not, no. I wouldn't say he is able to work at all.

Mr. T. F. Hamer: I move to strike the statement, "I wouldn't say he is able to work at all", as not responsive, and voluntary.

The Court: Sustained.

Plaintiff excepts.

1739 Q. Now with respect to his right shoulder, it is somewhat noticeable that that hangs down more than the other. Did you notice that?

A. Yes, sir.

1740 Q. Was he in that condition before he was injured?

A. No.

1741 Q. Has he been in that condition ever since the accident of March 15, 1943?

A. Yes, sir.

Mr. Tautges: You may cross examine.

Cross examination.

By Mr. T. F. Hamer:

1742 Q. You are a contractor, Mr. Ellis?

A. No, sir.

1743 Q. A carpenter?

A. I am a carpenter, yes. I am a builder, but I don't contract.

1744 Q. That is, you are in the building and selling business. Is that right?

A. Yes, sir.

[fol. 242] 1745 Q. Your son has worked with you?

A. Yes, sir.

1746 Q. Has he done some carpenter work?

A. Yes.

1747 Q. How much of that?

A. Well, he has worked with me several years.

1748 Q. So you could say he is not only a plasterer by trade, but he is a carpenter also?

A. Yes, sir.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

1749 Q. In the work of a carpenter, does a carpenter have use for his right arm?

A. Yes, sir.

1750 Q. And does a carpenter, especially in the construction of buildings, have to climb up ladders?

A. Yes, sir.

1751 Q. And do overhead work with his arms?

A. Yes, sir.

Mr. Tautges: That is all.

Mr. Hamer: That is all.

Witness excused.

The Court: We will take a short recess.

[fols. 243-245] (Following recess hearing of the above entitled cause was resumed, as follows).

1752 Mr. Tautges: If the Court please, we now offer in evidence the deposition of Dr. Robert D. Evans, taken pursuant to notice duly served, before Paul M. Ness, a Notary Public in and for Hennepin County, Minnesota, duly authorized to administer oaths, on Wednesday, the 9th day of April, 1944, at ten o'clock A. M. of said day, Tautges, Rerat and Welch, by P. G. Eichelzer appearing as counsel for plaintiff, and Mr. R. B. Hamer, of Omaha, appearing as counsel for defendant.

(The deposition of Dr. Robert D. Evans, just offered in evidence, is as follows).

— Robert D. Evans —

Deposition of Robert D. Evans omitted by stipulation.

[fol. 246] 1963 Mr. Tautges: We next offer in evidence the deposition of G. J. Buzard, taken at Seattle, Washington on the 7th day of March, 1944, between the hours of

9:30 o'clock A. M. and 4:00 o'clock in the afternoon, before H. C. Walker, Notary Public, at 914 Insurance Building, Seattle, Washington, pursuant to notice.

(The deposition of G. J. Buzard having been offered in evidence, on behalf of the plaintiff, same was read into evidence as follows):

MR. G. J. BUZARD a witness produced in behalf of the Plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Tautges:

1964 Q. What is your full name?

A. George Jenks Buzard, you had it a "T" in the subpoena, but it is George J. Buzard.

1965 Q. And where do you live, Mr. Buzard?

A. 305 Dawson Street.

1966 Q. In the City of Seattle, Washington?

A. Yes, sir.

1967 Q. By whom are you employed?

A. Union Pacific Railway Company, Seattle.

1968 Q. How long have you been in the employ of that company?

A. Well, it is twenty-eight years now; it will be twenty-nine years in September.

[fol. 247] 1969 Q. Were you in the employ of the Union Pacific Railway Company on March 15th, 1943?

A. Yes, sir.

1970 Q. Did you say, "Yes, sir"?

A. Yes, sir, that was the date of the accident. I forgot the date.

1971 Q. In what capacity were you employed on that day?

A. Locomotive engineer.

1972 Q. How long have you been employed by the company as a locomotive engineer?

A. Let's see, that is three years prior to that time.

1973 Q. What had been your employment prior to that time?

A. Locomotive fireman.

1974 Q. On March 15, 1943, were you employed in and about the Argo Yards of the company?

A. Yes, sir.

1975 Q. And that is in the city limits of the City of Seattle, is it?

A. Yes, sir.

1976 Q. Are you acquainted with the plaintiff, Newton W. Ellis?

A. Only to just work with him, that is all.

1977 Q. Had you worked with him prior to March 15, 1943?

A. Yes, sir, about two or three different days. I can't remember just exactly.

1978 Q. When was that in respect to the date of the accident?

A. Well, it would be before the accident, in the neighborhood of six months I suppose, before that; that is, including six months I imagine; I don't know.

1979 Q. As I understand you then, you had worked with him on two or three occasions prior to March 15, 1943?

A. Yes, sir, on this same job.

[fol. 248] 1980 Q. Had you worked with him on any other?

A. Not that I recall of, no, sir.

1981 Q. What job were you working on on the day of the accident?

A. From 4:00 until 12:00 shift.

1982 Q. That runs from 4:00 in the afternoon until——

A. 12:00 midnight.

1983 Q. 12:00 midnight?

A. Yes, sir.

1984 Q. What sort of a job was that?

A. Well, it is a more or less what you call a tramp job. We go whereyer they,—we do not have no set place we work, we just go wherever they have work for us to do.

1985 Q. Well, on the day of the accident what work had you been assigned to?

A. Well, we had orders that day, the first thing we had to do was go to Boeings with five hot loads for Boeings, Boeing No. 2, and from there on that day we had orders to come right back to Casein and start in there.

1986 Q. Do you recall what time it was when you came into the Casein plant, or that vicinity?

A. Well, it was as near 7:00 o'clock, in fact, I know it was within minutes of 7:00 o'clock, maybe five minutes one way or the other. I don't remember exactly just to the minute, but it was within five minutes of 7:00 o'clock one way or the other.

1987 Q. Do you remember how you came in there?

A. Well, there was only one way to come in.

1988 Q. Will you describe that?

A. Well, you back in off the main Marginal,—main line, a matter of about two blocks, and then you head in the rest of the way until you get right opposite the Casein [fol. 249] Building and then you back into the Casein Spur.

1989 Q. Now in the immediate vicinity of the Casein Building is there a street known as Myrtle Street?

A. Yes, sir.

1990 Q. Is that a paved street?

A. Yes, sir.

1991 Q. In what direction does that street run?

A. If I got my directions right it is east and west.

1992 Q. East and west?

A. Yes, sir.

1993 Q. Marginal Way, is that also a street, a public street?

A. Yes, Marginal Way,—we parallel Marginal Way.

1994 Q. Well, you say "We parallel Marginal Way". What do you mean by that?

A. Well, the tract follows right alongside of Marginal Way all of the way.

1995 Q. Is there also a street in that vicinity known as Fox Avenue?

A. Yes, sir.

1996 Q. In what direction does Fox Avenue extend?

A. Well, diagonally east, northeast by southwest.

1997 Q. Does Fox Avenue to some exaent parallel Marginal Way?

A. In a diagonal direction, yes, sir.

1998 Q. What is the location of the Casein Building with respect to Myrtle Street and Marginal Way?

A. Well, let's see. It would be east of Marginal Way. Is that right?

1999 Q. East or——

A. It would be east of Marginal Way and west of Myrtle Street. Is that right? I got my directions tangled up as long as I worked down there.

2000 Q. Does not Continental Can Company have a building or plant near the Casein plant?

[fol. 250] A. Yes, the Continental Can would be south of the Casein plant.

2001 Q. South of the Casein plant?

A. Yes, sir, that is right, south.

2002 Q. Can you describe to us the manner in which the Casein Spur is located?

A. Well, the Casein Spur starts off in an easterly and westerly direction and winds up in what I would call a straight south direction, all of the time, all of the way on a curve.

2003 Q. Does the Casein Spur cross Myrtle Street?

A. Yes, sir.

2004 Q. Does it come across Myrtle Street at some angle?

A. Yes, sir.

2005 Q. And as it comes across Myrtle Street at an angle, toward the Casein Building, in what direction is the track running, or located?

A. Let's see,—well, it is running northeast by southwest.

2006 Q. Now then, as this Casein Spur track crosses Myrtle Street it comes up to and past the Casein Building on a curve?

A. Yes, sir.

2007 Q. In other words, the track as it crosses Myrtle Street curves to the south and runs along the westerly side of the Casein Building?

A. That is right.

2008 Q. Now, on the westerly side of the Casein Building are there some loading docks?

A. Two loading platforms there, yes, sir.

2009 Q. Do you recall how far those platforms project out from the west side of the building?

A. Well, that I have no way of knowing because I never got back that far. The only thing I could say would be a guess.

[fol. 251] 2010 Q. Now, prior to the day of the accident, how many times had you been in on the Casein Spur yourself?

A. Oh, Gee! over a period of eighteen years it would be hard to say. All I can say is, plenty of times.

2011 Q. So I take it then you were thoroughly familiar with the Casein Spur?

A. Yes, sir.

2012 Q. And also the location of the Casein Building there with reference to the spur track?

A. Yes, sir.

2013 Q. The Casein Spur, does that come to a dead end as it proceeds south past the building?

A. Yes, it is a dead end track; yes, sir.

2014 Q. Will you tell us what work you were doing immediately prior to the occurrence of the accident in which Mr. Ellis was injured?

A. Well, when we backed in on the Casein Spur our orders called for the second car out. That would be the last one on the end of the track.

2015 Q. That would be the most southerly car?

A. Yes, sir. We coupled on to the first car which,—on this track at the time was two cars.

2016 Q. Perhaps I had better ask another question before we move into the Casein Spur. Were there some cars setting on that track opposite the Casein Building?

A. Yes, sir.

2017 Q. How many cars?

A. Two cars.

[fol. 252] 2018 Q. As I understand you, your work required you to pick up the most southerly of those two cars?

A. Yes, sir.

2019 Q. Now, in order to accomplish that purpose, tell us just what you had to do, what move you had to make.

A. Well, we had to couple the two cars together and pull them back out on Myrtle Street and shove this car we were after down to clear the Casein Spur and in order to do that we had to couple on, coming out. When we came out of the Casein Spur we had to couple on to a tank car that was spotted on Myrtle Street and shove it up to give us room to get out with those two cars.

2020 Q. Let's see, the track you were operating on when you did that, that was immediately north of Myrtle Street or adjacent to it?

A. Yes, sir.

2021 Q. And that tank car that you coupled on to, was that out at some point east and north of the Casein Building?

A. Yes, sir, in other words, we call it in front of the Casein Building.

2022 Q. Well, when you first came in on the track and before you picked up thte tank car, did you have just the engine?

A. A light engine, yes, sir.

2023 Q. What sort of an engine was that?

A. Well, it was a regular Union Pacific type switcher known as an 060 type.

2024 Q. Was that an oil burner or a coal burner?

A. An oil burner.

2025 Q. It was an oil burner?

A. Yes, sir.

2026 Q. Before you went into the Casein Spur at all, had you coupled on to this tank car?

[fol. 253] A. No, sir.

2027 Q. Well, when you went into the Casein Spur then to pick up the car that you were after, did you come in there with anything but the engine?

A. No, sir, just the engine.

2028 Q. When you came in on the Casein Spur you coupled on to the two cars that were setting on the Casein Spur?

A. Yes, sir.

2029 Q. Then what did you do?

A. Pulled them out and coupled on to the tank and shoved it up ahead in order to give us room to get out with the two cars and the engine. Understand that when that tank car is spotted it only leaves room enough for one car and one engine. If you have to get more than one car you have got to move the tank car off the spot to ready your work for you at the Casein plant.

2030 Q. Before the accident you did couple on to the two cars on the Casein Spur, did you?

A. Yes, sir.

2031 Q. And then pulled out of the spur and coupled on to the tank car?

A. Yes, sir.

2032 Q. And did you shove the tank car some distance east from where it stood?

A. Approximately a car length and a half, maybe two cars.

2033 Q. And that was in order to clear the switch so you could make a move to the west?

A. Yes, sir.

2034 Q. Did you make that move to the west after you had picked up the two cars?

A. Yes, sir.

[fol. 254] 2035 Q. Off the Casein Spur?

A. Off the Casein Spur, west, and kept that car off in the clear that we were after, the one we had orders to get.

2036 Q. And after you cut that car off, what did you do?

A. Started to shove back on to the Casein Spur and respot the car that was first out.

2037 Q. Now, before you made any of those movements that you have described with respect to the Casein Spur, did you know just what work you had to do there?

A. If I did I have forgotten about it now. I generally work with signals alone. Unless they do tell me I do not make a practice of remembering what they do tell me, because that is not my work.

2038 Q. Well, when you went in on the Casein Spur, did you know that it was just one of those cars that you were going to take away?

A. I don't know if we were going to take it away or not. I did not know but what we were just going in there to make a spot, for all I know.

2039 Q. Before you went in on the Casein Spur, you knew that there were only two cars standing on that track didn't you?

A. I did not know that, no.

2040 Q. Well, as you came in from Marginal Way, could you see what cars were on the Casein Spur?

A. Not coming in off of Marginal Way, no.

2041 Q. Well, as you came east on Myrtle Street?

A. Yes, if I had looked over there I could have seen how many cars there was over there.

[fol. 255] 2042 Q. Well, as you came in on Myrtle Street did you know you were to do some work on the Casein Spur?

A. Yes, I knew we had work up there, but as I say, I don't remember whether they told me what we had to do or not.

2043 Q. Did you know that the Casein Spur was just a short track?

A. Yes, sir.

2044 Q. How many cars could be set out on the Casein Spur?

A. I believe four, possibly five, but that is all. I know about how much it would hold, either four or five.

2045 Q. So of course you knew that there could not be many cars setting in on that track is that right?

A. That is right, yes, sir.

2046 Q. And as you moved west, or rather, as you moved east on Myrtle Street to come up to the Casein Building, if you looked at all you could readily see how many cars were on the Casein Spur?

A. Yes, I could have seen if I had of looked over there, but I do not even remember if I did that because those boys over there have a habit of parking their cars just as close to the railroad track as they can get it and I have to watch that pretty close. Generally I am looking ahead in the direction I am going and not worrying about the foreman's work at all.

2047 Q. Well, as you came in on the Myrtle Street track you did know that you could not move very much to the east of that building, that Casein Building?

A. You got me all tangled up in the directions again.

2048 Q. If you bear in mind that Myrtle Street runs east and west, unless I am tangled up.

[fol. 256] Mr. Hamer: That is my understanding of it.

Mr. Tautges: Will you read the question now, Mr. Reporter?

2049 Q. (Question read as follows): Well, as you came in on the Myrtle track you did know that you could not move very much to the east of that building, that Casein Building?

A. East would be towards Marginal Way, wouldn't it? Well, I would say four or five cars in there.

2050 Q. Did you know that the Casein Spur track was located rather closely to the building, that Casein Building?

A. Yes, sir.

2051 Q. And as that track approached and came around the westerly side of the building and in a southerly direction, that track had quite a sharp curve, did it not?

A. Yes, sir.

2052 Q. Did that track have a sharper curve than any other track you had operated upon in and about the Argo yard?

A. No, sir; no, sir.

2053 Q. How do you know that?

A. Well, we have got tracks that are approximately the same curvature, and I believe some of them more.

2054 Q. Are any of those tracks as close to buildings or fixed structures as the Casein Spur?

A. You say, are they?

2055 Q. Yes, are they as close to buildings or fixed structures as the Casein Spur? Are any of those other tracks that close?

A. Not that I recall; no, I can't recall of any.

2056 Q. Then as I understand you, the Casein Spur, as it curves there, is located closer to a fixed structure that any other track you know about in and about the Argo yard? [fol. 257]. Mr. R. B. Hamer: I will withdraw the objection noted there.

A. What was the question?

2057 Q. (Question read as follows): "Then as I understand you, the Casein Spur, as it curves there, is located closer to a fixed structure than any other track you know about in and about the Argo yard?" What I mean is, with respect to a track that has a curve in it.

A. Well, I can't say as I can answer that any more than I can say I don't know about that.

2058 Q. Well, do you recall of any track in or about the Argo yards that is curved and is located as close to a building as the Casein Spur is located to the Casein Building?

A. Yes, several of them.

2059 Q. And where are those?

A. Well, there is one at the local yard at our freight depot and there is one on King County lead, and one of our industries, that is, the Federal Pipe, and I believe now that Pacific Huts has got one that is on a curve that is practically as close, and I know at Boeings they have them and all our stock yards.

2060 Q. Now, with respect to the Casein Spur track, on the westerly side of that track there was open space, was there not?

A. Yes, sir.

2061 Q. There wasn't any building or fixed structure of any kind located within forty feet of the westerly side of that Casein Spur, was there?

A. Well, when you get down to feet, I don't know, but there was quite a space over there.

[fol. 258] 2062 Q. Would you approximate the distance of the closest fixed structure on the westerly side of the Casein track?

A. Oh, I would say thirty or forty feet across that parking there, I don't know just what it is.

2063 Q. Yes, there is a concrete drive or paving that is located west.

A. On the west side of the track, yes.

2064 Q. West side of the Casein Spur?

A. West side of the Casein Spur, yes, sir.

2065 Q. And that comes in from Myrtle Street, does it, and extends south for some distance?

A. Yes, sir.

2066 Q. And on the westerly side of the concrete drive or pavement, is that where the Continental Can have a plant or building?

A. No, that is not Continental Can, as I recall it. It is the Fox, — what is it they call that? — it is owned by the Continental Can, but it is under a different name. It is Troyer-Fox Company.

2067 Q. During the time that you have been familiar with the location of the Casein Spur track, can you tell us whether or not at one time there was another track that ran off the Casein Spur to the southwest?

A. All I can tell you about that is that I see the rails there, and if I ever was over that track I have forgotten about it.

2068 Q. Well, the only evidence remaining of any other track is a part of a frog?

A. No, they have taken the frog out. There is no frog there.

2069 Q. Are you sure about that?

A. Yes, sir.

2070 Q. Well, what is there there?

[fol. 259] A. Just a few rails running clear back to the bumping post and that old track that was in there. There is no frog in there.

2071 Q. You have never noticed the frog, if there was one there?

A. No, I have never noticed the frog if there was one there. In fact, I was down there the other day and there was no frog there. Of course, I never get on the ground. Of course, that is a very bad place there for a frog.

2072 Q. Why?

A. If they did not need it they would take it out.

2073 Q. Why would it be a bad place for a frog?

A. Well, a frog is something that is kind of more or less dangerous. You have always got the chance of your wheels climbing over a frog, where if you don't need it, you do not need to have it there.

2074 Q. Now during the course of the movement that was made in picking up the two cars that were on the Casein Building spur track, and disposing of one of those cars temporarily while you were going to set one of the two cars back in on the Casein Spur again, did you see or observe Mr. Ellis?

A. That is, during the entire movement you refer to?

2075 Q. Yes, or any part of it, yes.

A. Well, I can't remember of seeing Mr. Ellis until after we made our set out. Somebody in there gave me a signal, but I don't remember who it was, to come back out after I had coupled the two cars together. Whether that was Brown or Ellis, I can't tell you that.

2076 Q. Did you at any time see Mr. Ellis flagging on Myrtle Street?

[fol. 260] A. No, sir; no, sir.

2077 Q. Was it customary to flag on Myrtle Street at the Casein Spur when you were going to cross Myrtle Street?

A. Yes, they always made a practice of having a man on the crossing when it was possible at all, because that really is a blind crossing there, especially coming out, not so much going in, but especially going out.

2078 Q. Yes, automobile traffic does move east and west on Myrtle Street, is that right?

A. That is right.

2079 Q. And then when you started to come back in on the Casein Spur to set that one car back in on that track, did you see Mr. Ellis?

A. I never picked him up again until after I got my car across that crossing, that I remember of, or about the time that I was shoving across the crossing, because up to that time I was working with Mr. Field's signals up ahead.

2080 Q. Well, at the time you started to shove the car that was to be left on the Casein Spur back in there, did you do that on signal?

A. Yes, sir.

2081 Q. Who gave that signal?

A. Mr. Fields.

2082 Q. And at the time he gave that signal, where was your engine?

A. Well, it was between the car that we had cut off ahead of us, and the Casein switch.

2083 Q. But before you got the signal to shove, you were standing still, were you not?

A. Well, yes, I had come to a stop.

[fol. 261] 2084 Q. And as you were in position to shove into the Casein Spur, which way was your engine headed?

A. Well it would be headed east.

2085 Q. As I understand it then, the tank car was coupled on to the head end of the engine?

A. No, at that time we shoved that car out. I shoved that car out, — (interrupted).

2086 Q. When you started to shove back into the Casein Spur, you had coupled on to the head?

A. No, sir, we cut that car off up there. When we came out we shoved it up and cut it off and shoved our car back and went back up and started in.

2087 Q. When you started to shove the car back in on to the Casein Spur, that was involved in the accident, you had only that car and the engine?

A. Yes, sir, that car and the engine.

2088 Q. So that the movement you were going to make to set that car in on to the Casein Spur, that was a back up?

A. Yes, sir, a back up movement.

2089 Q. On which side of the engine were you?

A. The right side.

2090 Q. That would be the east side, having in mind that Myrtle Street runs east and west?

A. Well, it would be the south side of the engine, if the engine was headed east, and I would have to be on the south side and which I was.

2091 Q. You were on the side of the engine that was closest to the Casein Building, were you not?

A. Yes, sir.

[fol. 262] 2092 Q. Well then, as you started to back in, or shove in, across Myrtle Street to spot this car alongside of the Casein Building, where was the man located who gave you the signal to move?

A. Mr. Fields was at the switch. After I pulled out over the switch he was at the switch and threw the switch and

walked back on the crossing to see that I got across the crossing without hitting an automobile.

2093 Q. Yes, he was flagging the crossing.

A. You might call it flagging, but he was just walking ahead of the car.

2094 Q. Was he on your side of the engine?

A. Yes, sir.

2095 Q. Where was Mr. Ellis at that time?

A. Standing at the corner of the building. I picked his signal up and I picked him up. I don't remember whether he gave a signal. I did not have to have one after I had one from Fields. All I had to do was see Mr. Ellis, that is all.

2096 Q. From that time on did you see him until he was hurt?

A. Yes, sir, he never got out of my sight.

2097 Q. So that you knew all the time that Mr. Ellis was between the engine and the building from the time you started to shove across until he was injured?

A. I don't know where he was standing. I can't tell you that. All I can tell you, I seen him. I was watching him.

2098 Q. You saw him all of the time did you not?

A. After I got my car across the crossing.

2099 Q. After you started to shove across?

A. I was not paying any attention to him at all that there night until I went by Fields and then I had to work with Ellis.

2100 Q. Why did you have to work with Ellis?

A. Because he was the only man I could see.

[fol. 263] 2101 Q. Well, did you expect a signal from him as to when the car was to be started?

A. I don't know anything about what kind of a signal I was to get. All I had to do was see him and watch for a signal.

2102 Q. Well, did you have to work with Mr. Ellis so you knew where to spot the car?

A. Not necessarily.

2103 Q. Well, would you have been working with some other member of the crew then?

A. Yes, if Ellis would have stood there and I had got back far enough to see Brown, I would do like I did with Fields, I would drop Ellis and pick up Brown.

2104 Q. Well, at any rate, as you were shoving that car in on the Casein Spur, were you keeping a vigilant lookout in the direction in which you were proceeding?

A. Absolutely, yes, sir.

2105 Q. And that vigilant lookout also took in Ellis, did it not?

A. Yes, he was in my sight all of the time.

2106 Q. Was it your duty to keep in constant contact with him as you were making that movement?

A. Not necessarily. The rule says, any member of the crew.

2107 Q. But you had your eye on Ellis all of the time, did you not?

A. Yes.

2108 Q. After you started to shove in on the Casein Spur?

A. Yes.

2109 Q. Did you see any other member of the crew during that movement but Ellis?

A. Yes, Mr. Fields.

[fol. 264] 2110 Q. Well, after you went by Fields, did you see anybody but Ellis?

A. No, sir.

2111 Q. Did you know where the other member of the crew was?

A. No, sir.

2112 Q. Mr. Brown?

A. No, sir.

2113 Q. Did you know he would be at some point beyond or south of Mr. Ellis?

A. No, sir.

2114 Q. Well, as you shoved in on the Casein Spur, did you know what duties Mr. Brown had to perform?

A. No, sir.

2115 Q. Didn't you know that from your railroad experience?

A. No, I have nothing to do with his duties. As long as I know that I have got a man in sight to make the movement, that is all I am responsible for.

2116 Q. Now this car you were shoving back in on the Casein Spur, that was a large car?

A. Yes, sir,—wait a minute,—what do you mean, large? Long, or do you just mean a long car?

2117 Q. Well, long and wide.

A. Well, I can't agree with you on wide. I can't say as to the wide part of it, but it was a long car.

2118 Q. Was it longer than the ordinary box car?

A. Well, you are getting into something there now that I don't know what you call an ordinary box car.

2119 Q. Well, some box cars are fifty feet long.

A. Yes, sir.

2120 Q. And some are forty feet long?

[fol. 265] A. Yes, sir.

2121 Q. Now the ordinary, average box car is about forty feet long, is it not?

A. Well, as I say, with the business we are handling today I think the forty foot car is going out of style altogether.

2122 Q. I am talking now of the time of the accident and previous thereto.

A. Well, just as a rough guess I would say we handled just as many fifty footers as we had otherwise, or very close to that.

2123 Q. I am not sure whether it is clear in the record or not, except by inference, but this car you were shoving back in on the Casein Spur, was that a box car?

A. Yes, sir.

2124 Q. Do you know whether or not that car was partly loaded?

A. As to that, I cannot say, no, sir.

2125 Q. Do you know what sort of loads you generally picked up on the Casein Spur?

A. No, sir, I never have occasion to know that.

2126 Q. You don't know what they manufacture?

A. I know what they manufacture, but I have no occasion to know what they load them with.

2127 Q. What do they manufacture?

A. Well, I am told it is a glue factory. Other than that I don't know other than that even.

2128 Q. Now you knew all of the time, did you not, that there was a very close clearance between the Casein Spur track and the Casein Building?

[fol. 266] A. I never did know it before that it was that close, that is, that it was as close as it is.

2129 Q. That is, you had never appreciated that fact?

A. No, I never knew it and I will tell you why; because when I am in the cab of the engine the cab of the engine sets five or six feet, whatever the distance is, away from the track, consequently when I look down there I see five or six feet of ground there, just about the same as any other level. I never was on the ground before in my life until this time of the night of the accident.

2130 Q. But I understood you to say you had been in on that Casein Spur many times.

A. Yes, sir.

2131 Q. Had you been in there in the day time?

A. Yes, sir.

2132 Q. Had you been in there at night?

A. Yes, sir.

2133 Q. And I take it that you have good eyesight?

A. Yes, sir.

2134 Q. Nothing wrong with your eyes?

A. No, sir. Let me explain this to you. The track curves this way, (indicating) and when I come in on the engine the engine is setting out over the track away from the building extending, and owing to the curve of the track the cab of the engine is setting away from the engine and the front end of the engine is setting this way, (indicating), so you see now, the middle of the engine is closest to the building. That is why I was on the furthest point from the building, therefore I never knew it was so close.

2135 Q. But at any time you moved in on that track you could see the building?

A. Yes, sir.

[fol. 267] 2136 Q. Is that a one story building?

A. Yes, I would call it one or one and a half stories. It is not a two story, I do not think only in parts.

2137 Q. That building, I believe, is covered with sheet metal?

A. Yes, corrugated galvanized iron.

2138 Q. Sort of an aluminum color?

A. Yes, sir.

2139 Q. And with this type of switch engine that you had on the day of the accident, was the top of the building higher than the top of your engine cab?

A. I could not say as to that. I never did look at it to see, but it must be close to that though.

2140 Q. Well, at any rate, any and every time you moved in on the Casein Spur track, especially in the day time, you would not have any difficulty or trouble in seeing the Casein Building, would you?

A. No, I would not.

2141 Q. Can you approximate the number of times that you have been in on the Casein Spur?

A. I have no way of knowing, no, sir, and I could not begin to give you any idea.

2142 Q. Well, would you say you had been in there one hundred times or two hundred times?

A. No, I could not say that even. See, prior to the time I was promoted I was a fireman and I would be on the other side of the cab all of the times I was in there then, and during the three years previous to the accident I would be on the right hand side, and as I say, I never did have any [fol. 268] occasion to ever have it impressed on my mind that that was even close, other than to see the sign that says "Impaired Clearance". That is all the reason I ever had to know that it was a close clearance. The company maintains a sign there year in and year out, ever since I can remember it has been there, and it says, "Impaired Clearance", on it.

2143 Q. What does that mean to you?

A. Well, that means that,—it don't mean anything to me much, no more than, well, it does not mean anything to me because I have no occasion to get outside of the cab there. Other than, as I say, to see that sign there as a brakeman, he would have to be governed by that sign, but as an engineer it does not mean much to me, so I would not know it was close clearance if it had not been for the sign up there, but to look and see how much it was, I would never know.

2144 Q. When did you last see that impaired clearance sign?

A. Last see it?

2145 Q. What?

A. You say, last see it?

2146 Q. Yes.

A. Day before yesterday, I believe.

2147 Q. That sign that you saw day before yesterday, does that have the appearance of being a rather new sign?

A. No, sir. I did not look at it closely, but it looked like all of the rest, and that sign, they keep that painted up nice and neat.

2148 Q. That sign that is there now, where is it located?

A. That is located on the east side of the track between Myrtle Street and the Casein Building, just before you get to the corner of the building going in on Casein Spur.

2149 Q. Is it located right near the corner of the building?

A. Yes, it is near. Yes, I don't know the exact distance [fol. 269] but it is near.

2150 Q. How high is that sign?

A. Oh, I would say it was eight feet off the ground, seven, between seven and eight feet off the ground.

2151 Q. Did you ever examine the sign before last week?

A. Only at the time of the accident we all looked at it and everybody called each other's attention to it then at the time of the accident and talked about it.

2152 Q. Well you say, "Everybody called each other's attention to it at that time". Who do you mean by everybody?

A. Our crew, the remaining of our crew. Other than Mr. Fields and myself,—I don't know if the fireman was,—whether he was talking about it or not. I do not remember that, but we all made some remark. I distinctly remember we all made some remark about that sign that night.

2153 Q. Do you remember what remark you made?

A. Not any more than to say that the sign was there, is all I can remember, that clearance sign was there.

2154 Q. Well, as you shoved the car on the track did you notice the sign before the accident?

A. On that particular night I can't recall whether I did or not.

2155 Q. Now what day were you there last week?

A. What day?

2156 Q. Yes, examining the scene.

A. This is Tuesday?

2157 Q. Yes.

A. Saturday,—wasn't it Saturday we was down there?

2158 Q. Was it Saturday or Friday?

[fol. 270] A. It was pay day, Friday.

2159 Q. Who was down there with you?

A. Mr. Brown and Fields and Mr. Watts.

2160 Q. What time of the day were you there?

A. I was there at 9:00 o'clock, I think, and we left about noon.

2161 Q. Now, prior to that time had you been subpoena-d as a witness for the taking of your deposition?

A. Here?

2162 Q. Yes.

A. Yes, sir.

2163 Q. So that it was after you were subpoena-d in behalf of Mr. Ellis for the taking of your deposition you and these other gentlemen whose names you have mentioned, went down there?

A. Yes, sir.

2164 Q. What did you go down there for at that time?

A. Oh, I don't know. I went down there to look the ground over mostly. That is about all I can say.

The Court: We will take a short recess at this time.

(Following recess hearing of the above entitled cause was resumed, with Mr. Tautges continuing to read the direct examination in the deposition of Mr. G. J. Buz-rd, as follows:)

2165 Q. Well, was that for the purpose of refreshing your recollection as to the facts and circumstances connected with the accident?

A. What this man here told us, we were brought there for us to have him read our statements that were made to the company in regard to the accident which was a year ago, just to refresh in our minds what we had said and our statements. Other than that, why, I don't think there was any other reason for it at all. As far as I was concerned, there was not.

[fol. 271] 2166 Q. Well, while you were examining the impaired clearance sign, was your statement, previously made, read by you?

A. Yes, sir;—read by me? You say, read by me?

2167 Q. Yes.

A. No, sir.

2168 Q. Well this statement that you had previously made some time following the occurrence of the accident, when was that statement made?

A. That following day.

2169 Q. Was that a written statement?

A. Yes, sir, mine was, yes, sir.

2170 Q. What is that?

2171 Q. What is that?

A. Yes, sir, mine was.

2172 Q. Who wrote up the statement?

A. That following day Mr. Coburn typed it.

2173 Q. Was that a typewritten statement?

A. Yes, sir.

2174 Q. Who was present when you made that, or when that typewritten statement was taken?

A. I don't remember any other than Mr. Coburn and Mr. —— our yardmaster, Mr. Estes.

2175 Q. Where was that statement taken?

A. In the yard office at Argo.

2176 Q. The Argo Yard?

A. Yes, sir.

2177 Q. Did you read that statement again last Thursday?

A. Last Thursday?

[fol. 272] 2178 Q. Yes.

A. No, not last Thursday, no.

2179 Q. Well, when did you last read that statement or have it read to you?

A. Friday.

2180 Q. Last Friday?

Q. Yes, sir.

2181 Q. Where was that?

A. There at the scene of the accident.

2182 Q. Now as you were shoving this box car back in on the Casein Spur and during the time that you had your eye on Mr. Ellis, at what rate of speed were you moving?

A. Well, after you get an engine down to a mile or a mile and a half an hour it is hard to tell, but I was not going over that. I was just moving as slow as I could move and still be moving.

2183 Q. What was the condition of the light at that time, the condition of visibility?

A. Well, it was clear. It was just like it is now out, as near as I can recall.

2184 Q. It was a clear day?

A. Yes, sir.

2185 Q. But it was getting dark?

A. Oh, no, no, it had not got dark yet when the ambulance came.

2186 Q. Well, on March 15, 1943, at 7:00 to 7:30 it is getting dark, is it not?

A. It might be starting to gray up a little bit, I don't know about that, but we do not call it dark until it comes [fol. 273] time to us the lanterns, and when you can't see very far you holler for the lanterns.

2187 Q. Do you know what time the sun sets on March 15th.

A. I don't, I never paid any attention to that. What I call daylight is as long as I can see without a lantern. That is daylight to me.

2188 Q. Well, at 7:00 or 7:30 is it as light as at noon?

A. No, I do not think it would be. I don't suppose it would be because the sun is not high, but the visibility was good.

2189 Q. Now this place you occupied in the cab in the engine, how far would that be from the back end of the engine?

A. Well, as a rough guess I would say thirty feet, between thirty and thirty-five feet.

2190 Q. You had a tender on the engine?

A. Yes, sir.

2191 Q. The tender was between the engine and the box car?

A. Yes, sir.

2192 Q. Now then, as you shoved in and as the car would get on around the curve, would some part of the side of the car get closer to the building?

A. Yes, it would.

2193 Q. Do you know whether or not with a fifty foot car some part of the side of the car would get closer to the building than it would with a forty foot car?

A. Yes, sir.

2194 Q. And what is the fact as to that?

A. What do you mean, fact?

[fol. 274] 2195 Q. Well, would the fifty foot car, some portion of it, get closer to the building rounding that curve than some part of the side of a forty foot car?

A. Well, as I say, yes, the fifty foot car would naturally crowd the diameter of the circle more than the forty foot would.

2196 Q. The sharper the curve is, would that bring some portion of the side of the car closer to the building?

Mr. Hamer: If you know.

A. Yes, I think my previous answer would be the answer to that, wouldn't it?

2197 Q. That is what I want to know. I want to get your answer and not any supposition.

A. Yes.

2198 Q. You knew all of that from your long railroad experience, did you not?

A. Well, here we come back again. I never had occasion before to ever have that brought to my mind.

2199 Q. Well, what you have told us with respect to the closeness of the side of the car to a building or other fixed structure, rounding a curve, your answer was based upon your observation and experience, was it not?

A. Yes, since the accident, because I never in my life

have had any occasion to have anything like that happen before.

2200 Q. You mean to tell us you did not know that until after the accident?

A. I will have to say yes, I did not know it.

2201 Q. Although you had been railroading for how many years?

A. Well, over thirty years now.

[fol. 275] 2202 Q. And you had shoved and pushed many box cars around various degrees of curves?

A. Yes, sir, there never has been in my life anything to make me stop and think about that before, that I can recall.

2203 Q. Well, as you shove a car around a sharp curve, you can see if there is a fixed structure there, you can see it moving over toward the structure, can't you?

A. You could if you were in a position to see it, but I am looking at the end of the car all the time.

2204 Q. Well, sometimes you are looking out of the cab window, are you not?

A. Yes, sir, and that cab window is the full distance south away from the end of that building as any car can get, as I explained before.

2205 Q. Well, as you shoved the box car in on the Casein Spur, did your cab come alongside of a part of the building?

A. Yes, many times. As I say, I am back alongside of the building, but I am five or six feet away from the building with my cab. Lots of room.

2206 Q. Well, your cab extends to the side of the engine far enough so you can see out and beyond the head of the engine, or back of the engine, whichever direction you happen to be looking, does it not?

A. Yes, but the cab of the engine is no wider than the allowed width of the engine or the allowed width of the box car.

2207 Q. Well, does any part of the engine extend over the track as far as the box car does?

[fol. 276] A. Approximately the same.

2208 Q. So that when you are looking out you can see the side of the cars, can you not?

A. On straight track, yes, sir.

2209 Q. Well, and on curves where the car is being shoved ahead of the engine you can see the car too?

A. Well, I am looking at the end of the car more or less

and I can't see behind the curve that way. You can't see very far, you see, probably, or I would say you can see half way.

2210 Q. You can see half of the car?

A. Half of the length of the car, I believe you can see there from looking out of the cab window. I never paid much attention to it. I never paid any particular attention to it.

2211 Q. Well, now, you kept your eye on Ellis from the time you started to shove in on the Casein Spur until he was hurt. What was he doing?

A. Well, he was standing at the, — well, first he walked in a ways, as I recall it, he walked in a ways, half a car length in there, and then he stopped and every once in a while he would look back and see if he could see me to be sure he would not get out of my sight because the rules say the minute he gets out of my sight I stop. That is a stop signal. so I kept crawling back in there and watching him all of the time and the first thing I knew, why, I saw his right foot twisted on the ground and I stopped right there, but that was not supposed to be and I could still see all of his body.

2212 Q. You could still see all of his body?

[fol. 277] A. Yes, sir.

2213 Q. Now before anything happened to Mr. Ellis, had part of the car got by him?

A. It had to, because he was caught in the middle of the car.

2214 Q. But I am asking you now about what you saw. Did you see the front end of the car?

A. No, I was not paying any attention to that at all. I was just looking at him. I never even looked at the car at all. I was just looking at him.

2215 Q. But in looking at Mr. Ellis you could not help but see the car?

A. Well, naturally you could see the car going by him, if you want to put it that way, but naturally I was looking at him.

2216 Q. Well, in looking at him you did see part of the car go by him?

A. Well, I think you sense that more than you see it.

2217 Q. Well, you have already told us your eyesight was good and you were keeping a vigilant lookout ahead.

A. Yes.

2218 Q. But when you saw Mr. Ellis you could also see the car within range of your vision, could you not?

A. Yes, the car was within range of my vision. I saw it until part of it went by and the other part I could not see that was around the curve.

2219 Q. Well, you knew all of the time, did you not, that as that car proceeded ahead of the engine, rounding that sharp curve, that the side, that some part of the side of the car was going to get very close to that building?

A. I did not. I did not; definitely not. I never had no occasion to ever know before that that car would creep up [fol. 278] on the building.

2220 Q. Well, if you were looking you could see that, couldn't you?

A. No, you cannot see that. If that was a perfectly round building you could see it, but it is not. It is chipped off into diagonals and I was looking off across this first thirty feet of diagonal, and he was standing there on this first diagonal there, this piece of straight building there, so my point of vision was this, (indicating). Of course I can't see behind the building at all.

2221 Q. Did you see Mr. Ellis get caught and crushed between the side of the car and the building?

A. No, I did not see that at all. All I saw was, as I say, I saw his right foot twisted on the ground and then I stopped.

2222 Q. Well, you could see his body too, could you not?

A. No, in order to see just exactly what he was up against I had to get back inside of the cab and look out the back window and I see he was pinched after it was all over with. He was standing partially,—I could see his back and of course his left leg and left side was away from me and I could not see that.

2223 Q. Well, which side of the cab were you riding in?

A. On the engineer's side, on the right side.

2224 Q. Which window were you looking out of?

A. The side window.

2225 Q. Looking out of the side window you could see Mr. Ellis?

A. As I say, just half or two-thirds of his body standing there around this little curve.

2226 Q. Well, could you see the upper part of his body?

[fol. 279] A. Yes, sir.

2227 Q. His arms?

A. I don't remember it, as I recall it. I can't say I remember exactly his arms. I don't recall that.

2228 Q. Well, as a matter of fact, you could see his head and body and legs and feet could you not?

A. Yes, sir, that is, that side of him.

2229 Q. As a matter of fact, you could see the whole of him?

A. That is what I was looking at, the whole of him,—well, not all of him, the right side of him, more or less the right side, whatever I could see of that side, because he kind of had his back partially to the building, understand.

2230 Q. You could see his face?

A. Only when he turned around a couple of times and looked to see if I was still in his sight.

2231 Q. As a matter of fact, you saw him get caught between the side of the car and the building, did you not?

Mr. Hamer: I will withdraw the objection noted there.

A. No, I cannot say that, that I could—(interrupted).

2232 Q. You have told us you could see the whole of Mr. Ellis, that is right is it not?

A. Well, if I saw the whole of him I would have to see all the way behind him. All I could see was the side toward me.

2233 Q. Well, you could see some part of his body from his feet up to his head, there is no doubt about that?

A. Yes, sir.

2234 Q. You could see the side of the building?

[fol. 280] A. Where he was standing?

2235 Q. You could see the wall of the building?

A. Where he was standing?

2236 Q. Yes.

A. No, no, I could not because I was around this little jog in the building and I could not see that part of the building at all.

2237 Q. Well, you knew how the building was constructed and located with reference to the track did you not?

A. Only as I say, that my future experience put me from five to six feet away from that building. That is all I can say as to that, because I was never in there before, only in the cab of the engine.

2238 Q. You knew the location of the building and its walls with respect to the spur track, did you not?

A. Yes, I can't say as I know that because I have no occasion to know it.

2239 Q. Well didn't you know that from observations made?

A. I never made no observations previous to that, I had no occasion to.

2240 Q. Did you know that from looking with your eyes?

A. No, I did not. I never paid any attention to that there. As I say, I had plenty of room between the cab and the building and that is all I know, but the distance in there previous to this accident I did not know.

2241 Q. You did know there was impaired clearance in there did you not?

A. Only by the sign, that is all I know about it. Just what the sign said and I did not know whether that could mean two feet, six feet, or four feet, or whatever it means. The sign says "Look out".

[fol. 281] 2242 Q. Well, impaired clearance would mean insufficient clearance?

A. It would mean under standard clearance.

2243 Q. It might be anywhere from six inches to several feet?

A. Yes, I suppose so. I don't know what the rules on that,—the Interstate Commerce calls for on that. I never had occasion to go into that.

2244 Q. What sort of brakes did you have on the engine?

A. I had automatic air brakes.

2245 Q. And also did you have a straight engine brake?

A. Well, what the E. T. equipment is supposed to be is automatic. It is E. T., you either use straight air or automatic, which ever way you want to use it.

2246 Q. When you stopped the engine, which brake did you use?

A. The engine air valve.

2247 Q. And is that independent of—(interrupted).

A. Yes, sir.

2248 Q. At one mile or two miles you could stop instantly?

A. Absolutely instantly, and it was stopped instantly.

2249 Q. How far did the engine move after Mr. Ellis was caught and crushed between the side of the building and the car?

A. Well, it is hard to say, but the facts prove it that we had to roll him back about twelve inches to get him out, and that is the way he went in, so evidently I must have moved in the neighborhood of eleven or twelve inches from the time it first started to squeeze him until I got stopped. But, from the time I saw his foot twisted on the ground, I believe I stopped, I don't think, well, the engine stopped right there but the slack of the car would maybe amount to a couple of, or three inches. In remarking about the [fol. 282] brakes on that particular engine, that particular engine has got the best brakes of any engine we have got. It always has had for the eighteen years I have worked, on that engine it has got the best brakes any engine has got. Why, I don't know.

2250 Q. Would you say you could stop that engine quicker than any other engine?

A. Yes, I think our brake action is a little bit quicker on her than it is on any other engine I happen to remember. It just so happens that everybody likes that engine to switch with because it has got such good brakes. On top of that she had brand new brake shoes which gives her quicker braking power and greater braking power on that particular day.

2251 Q. Now, with respect to the tracks on the Casein Spur track, what was the condition of that track as to having either high or low joints in it?

A. I can't say about that. I am not a track man. I am just a locomotive engineer and I do not pay attention to that.

2252 Q. That was rather rough and uneven?

A. That I could not say. I have no way of knowing whether it was rough or uneven. You would have to talk to the section boss about that.

2253 Q. You had operated your engine and crossed over it?

A. Yes, but running it at one or two miles an hour you don't know whether it is rough or what it is.

2254 Q. You can tell somewhat from the movement of the car and the engine?

A. Well, I am paying attention to the signals to get into a place so busy like that and I do not pay attention to the track.

[fol. 283] 2255 Q. You would know whether the engine rolled somewhat and if the cars pitched some?

A. There would not be any rolling or pitching on a speed of one and one-half to two miles an hour.

2256 Q. If the tracks were uneven?

A. No, the springs would take care of that. The engineer could not state whether it was rough and uneven or not, that would be impossible.

2257 Q. Can you tell us whether or not Mr. Ellis was working on the customary side in respect to the movement you were making at the time of the accident?

A. Well, all I can say about that is that previous to this accident and including all of the time I was firing an engine I never saw a man work on the other side of the engine. He always worked on the engineer's side.

2258 Q. So that according to your observations Mr. Ellis was working on the proper, at least, the customary side?

A. Well, it is optional. Whoever is on the ground, they can work on either side, as far as that goes. It does not make any difference which side they work on.

2259 Q. But in going inside on the Casein Spur you never saw any one work on any other side in doing the work he did?

A. Yes, that is, speaking for myself. All of the other fellow says they work on both sides. Oh, previous to the accident I can't recall of any time working on the fireman's side.

2260 Q. Well now, since the accident have you worked in on the Casein Spur?

A. Yes.

2261 Q. Has there been any change in the manner of working?

A. Oh,—(interrupted).

[fol. 284] 2262 Q. In on the Casein Spur track?

A. Oh, I would say maybe once or twice they have worked on the fireman's side since that, but most always they work on my side.

2263 Q. Now after Mr. Ellis was hurt how long was he in the position there where he was caught before you got him out of there?

A. Oh, I would say three minutes, possibly three and a half, probably three minutes, just as a guess.

2264 Q. Can you describe to us just what his position was in there before he was moved?

A. No, sir, I did not get back there.

2265 Q. You did not get out on the ground?

A. No, I started back and just as I started back the brakeman hollered I would have to move ahead a little bit to get him out, so I did not get back until after they had him down on the ground.

2266 Q. Well, after Mr. Ellis was first caught in there, you did stop the engine?

A. Immediately.

2267 Q. And then did you start up again?

A. Not until I got a signal to, a verbal signal. The man was holding him there in case he did fall. When I did release him he was holding him with both hands so he could not give me a signal. He just hollered at me.

2268 Q. Where was the man with respect to Mr. Ellis?

A. He was down underneath the car holding up his hips.

2269 Q. Who was underneath the car?

A. Mr. Fields.

2270 Q. What was Mr. Ellis' position?

A. I don't know. I did not get back there.

[fol. 285] 2271 Q. Could you see him from the cab?

A. Yes, I could see him just standing up there. His hat was lying on his shoulder.

2272 Q. You could see he was pinched in between the side of the car and the building.

A. Yes, I could see it was tight in there, but I did not know how bad or anything he was. I did not go back there.

2273 Q. In which direction did you move the engine after you had come to a stop, after Mr. Ellis was hurt?

A. Well, that would be ahead, which would be east.

2274 Q. Would that be in the direction in which you were backing, or the opposite?

A. The opposite. I backed in and I would have to free him going forward.

2275 Q. Well, after you started to move the engine after the first stop was made at the time he was hurt, did you stop again?

A. You mean when I was trying to free him?

2276 Q. Yes.

A. Yes, I used my own judgment about that because nobody could give me a signal to move.

2277 Q. Which direction did you move when you used your own judgment?

A. Ahead; forward.

2278 Q. And did you stop again?

A. Yes, I got me a mark down there on the ground and I moved about fourteen or sixteen inches ahead.

2279 Q. Well, before Mr. Ellis was gotten out, how many moves were made?

[fol. 286] A. I told you I moved ahead about sixteen inches, and then the brakeman said, "That is too far, you got to come back a little", so I moved back four inches and they got him out then.

2280 Q. Well, in the course of those movements that were made, was Mr. Ellis rolled back and forth a little?

A. Yes, he would have to be because I had moved ahead and I moved a little too far, evidently it was too far to get him out, and I had to move back to the position where they got him out.

2281 Q. When you say you moved ahead, was that toward Myrtle Street?

A. Yes, sir.

2282 Q. You moved too far in that direction?

A. Yes, Oh, a matter of three or four inches, such a matter. It is so hard to judge that with the slack of the car. I might have moved right with the engine but the car probably crowded him with the slack taken up.

2283 Q. But you moved too far?

A. The brakeman told me that the car had rolled him up a little bit too far, the opposite direction you see, and he was not quite loose yet.

2284 Q. That is, you had rolled him so far in the direction in which you were going it pinched him in tighter?

A. No, I don't know that it pinched him in tighter, but afterwards they said one of his shoulders was still tight there, so they just said, "Come back a couple of inches", so I moved back a couple of inches, or whatever it was. It was not over four inches.

2285 Q. In other words, he was moved a little too far towards Myrtle Street?

[fol. 287] A. Yes, sir.

2286 Q. And in the other movement you had to make back, that would be the southerly direction?

A. Yes, sir.

2287 Q. How far back was he moved, that is, how far south after you had moved a little too far to the north towards Myrtle Street?

A. Well, as near as I could mark it without getting down there with a rule and marking it, I would say about four inches, because I had spotted a definite mark on the pavement with the back part of the car.

2288 Q. Well, the last move that you made which was the movement in which he was finally released, did you see what was done with him?

A. No, they had him on the ground when I got back there. He just dropped right out of there, I guess. I don't know either, but they had him out on the ground when I got back there. I asked somebody, I says, "Is he hurt bad?", or something like that, and somebody said they did not know, and then I went and double checked on the ambulance again.

2289 Q. Now, before the ambulance came was the car that hurt him moved some place?

A. Yes, sir.

2290 Q. Where was that moved to?

A. Just pulled out on Myrtle Street out of the way so the ambulance could get back right in there alongside of him.

2291 Q. After the ambulance took Mr. Ellis away, was that car set back in on the Casein Spur?

A. Yes, sir.

[fol. 288] 2292 Q. Now, at the place where Mr. Ellis was caught between the building and the car, did you notice whether or not any indentation was made on the side of the building?

A. Yes, sir.

2293 Q. Will you describe that?

A. Well, it just looked like two shoulders. It looked like shoulders were pushed in the building. That is the way it looked to me like. I don't know anything else.

2294 Q. And this corrugated steel or siding, whatever you call it, that was pushed in or dented in toward the interior of the building?

A. Yes, sir. I could not say if those dents were there previous to the accident or he made them. They were just there, that is all I can say.

2295 Q. Those dents are still there?

A. Yes, sir.

2296 Q. And were there when you looked the place over last week?

A. Yes, sir, I noticed them.

2297 Q. Do you know whether or not Mr. Ellis was unconscious at any time?

A. I could not say as to that. He did not talk, but he had his eyes open. He did not talk or say anything while I was by him.

2298 Q. You went up to him before the ambulance took him away?

A. Yes, we went over to him and stood around him after I took my car out on the road and checked on the ambulance.

2299 Q. Did you try to talk with him?

A. I don't recall whether I did or not.

2300 Q. He did not talk at all?

A. No.

[fol. 289] 2301 Q. Did he make any sounds?

A. No, sir, he did not.

2302 Q. Did he appear as though he were asleep or dead?

A. No, he had his eyes open and he was breathing and that is all I can say.

2303 Q. Well, you would say that he appeared to be unconscious?

A. I don't believe in my mind that he was unconscious but as to whether he was or was not, I could not state, because he was looking around. No, he was not unconscious. He was looking around and rolling his eyes.

2304 Q. His eyes were rolling?

A. Yes, he was in quite bad pain and I did not want to ask him anything because I would not want anybody talking to me if I was in that position.

2305 Q. Did he appear to be in pain?

A. Yes.

2306 Q. How could you tell that?

A. Just by the way he was breathing, I just thought he was. I felt pretty sick about it and I did not want to talk to him or anybody.

Mr. Tautges: That is all.

Cross examination.

By Mr. Hamer.

2307 Q. Just a few questions, Mr. Buzard. As I understand your testimony on direct examination, you have a recollection of seeing Mr. Ellis by the corner of the Casein

Company's building either just before or while the car that was behind the engine was going across Myrtle Street?

[fol. 290] A. Yes. He was standing in the neighborhood of this sign.

2308 Q. You mean the impaired clearance sign?

A. Yes, sir.

2309 Q. And that put him on the side of the tracks next to the building?

A. Yes, sir.

2310 Q. And then it was after he was in that position that you saw him walk to the south or southwest around the building?

A. Yes, sir.

2311 Q. Did he remain on the east side of the tracks or the side of the tracks between the building and the tracks?

A. Yes, sir.

2312 Q. Now, you say that you went to double check on the ambulance?

A. Yes, sir.

2313 Q. What did you mean by that?

A. Well, when I found out that he was pinched in there I did not ask anybody any questions or anything. I just told the fireman to call the ambulance at once.

2314 Q. Did the fireman then leave the engine?

A. Yes, sir.

2315 Q. And then when you say you went to double check, what did you do?

A. I went back and called again to find out for sure they got the call for the ambulance and that it was coming.

2316 Q. Where did you call from?

A. The Tyee Lumber Company office.

2317 Q. About how far is that from the corner of the Casein Building?

A. Approximately 200 feet across there.

2318 Q. Now did you know what time it was that you called for the ambulance?

[fol. 291] A. 7:10.

2319 Q. 7:10?

A. 7:10.

2320 Q. Did you look at your watch at that time?

A. Yes, sir.

2321 Q. What is this track called, Mr. Buzard, that runs along, in or parallel Myrtle Street? What do you call that track?

A. Well, that is known, — it was explained to me once.

2322 Q. Just what do you call it?

A. King County Lead.

2323 Q. Is that a lead track?

A. Yes, sir.

2324 Q. Is that track used in switching movements for switching at other places than into the Casein Company?

A. Yes, sir. I think there are six or seven different industries off on that track.

2325 Q. Do you know about how long it was after this accident before the ambulance arrived?

A. Just approximately I would say twenty minutes.

2326 Q. Now after that did you at somebody's request or instructions, move the car back into the Casein Spur and spot it in the position where it was at the time that this accident occurred?

A. Yes, sir.

2327 Q. At whose instructions?

A. Mr. Coburn.

2328 Q. How did you determine just where to put it? How did you do that?

A. Well, I done it with signals.

[fol. 292] 2329 Q. Well, was there anything about your position in the cab that satisfied you in any respect that you had placed the car in the same spot?

A. Yes, sir.

2330 Q. How did you do that?

A. By the edge of the pavement where I spotted that originally.

2331 Q. And that is the south edge of the Myrtle Street pavement?

A. Yes, sir.

Mr. Hamer: That is all the questions I have.

Redirect examination.

By Mr. Tautges:

2332 Q. Can you tell us, Mr. Buzard, how far in from the Myrtle Street side of the Casein Building that this place is where Mr. Ellis was hurt?

A. Well, all I can say about that is, half of the length of that car and the length of the tender, and the distance between the tender and the cab, but the distance in feet I could not tell you.

Mr. Tautges: That is all. Do you waive the signature, Mr. Hamer?

Mr. Hamer: Yes, I will waive this signature.

Witness excused.

[fol. 293] 2333 Mr. Tautges: We now offer in evidence the deposition of the witness, J. C. Brown, taken on behalf of the plaintiff, in Seattle, Washington, on March 7, 1944, at 914 Insurance Building, before H. C. Walker, a Notary Public in for the State of Washington, residing at Tacoma, Washington, pursuant to notice.

(The deposition of J. C. Brown having been offered in evidence, same is read into evidence, the direct examination being read by Mr. Mecham).

J. C. Brown a witness produced in behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Tautges:

2334 Q. Mr. Brown, what is your full name?

A. Joseph Clark Brown.

2335 Q. And you live here in Seattle, Washington, do you?

A. Yes, sir.

2336 Q. Are you in the employ of the defendant, the Union Pacific Railway Company?

A. Yes, sir.

2337 Q. You were present during the taking of the deposition of Mr. Buzard, the engineer?

A. Yes, sir.

2338 Q. You heard all of his testimony?

A. Yes.

2339 Q. Were you a member of the switching crew that he mentioned as working on March 15, 1943, at the time Newton W. Ellis was injured?

[fol. 294] A. Yes, sir.

2340 Q. You are acquainted with Mr. Ellis are you?

A. I worked with Newt, yes.

2341 Q. What is that?

A. I worked with him, yes.

2342 Q. Did you work with him prior to March 15, 1943?

A. Well, no, I worked with him the day before that and I think altogether I have worked with him three or four times, three or four shifts.

2343 Q. What was your position with the crew that was working at the time of the accident?

A. Well, my position was, I was working as a field man and one of Newt's helpers.

2344 Q. Had you worked in on the Casein Spur before the day of the accident?

A. Yes.

2345 Q. How many times had you worked in that vicinity?

A. Well, I don't know the exact number of times, but we went in there sometimes two or three times a week and I had been on this job at that time about three or four months.

2346 Q. And during that period did you get in on that track there every day or so?

A. Well, not every day, but as I say, I think on an average it would be two or three times a week that I worked in on that spur.

2347 Q. Was that during the day time?

A. Yes, and I had been in there at night time too.

[fol. 295] 2348 Q. Now you heard the testimony of Mr. Buzard with respect to the car and engine movements that were made at and prior to the time of the accident?

A. Yes.

2349 Q. And what he said about that, does that accord substantially with your recollection of it?

A. Well, of course he is working in a different position than I am. I can't see it through his eyes but as far as what he said, as far as I know, that is just about the way it was.

2350 Q. What I had in mind particularly was with reference to the car movements that were made preliminary to the attempt to shove back in on the Casein Spur the car that was to be left there.

A. Well, one thing that I think he got wrong, he said that Ed Fields lined that switchback into the Casein Spur. I lined the switch into the Casein Spur and Ed Fields was on the head of the engine, that is, not on the engine, but working ahead of the engine.

2351 Q. Ahead,—you mean the front end of the engine?

A. The front end of the engine, yes.

2352 Q. And the front end of the engine, that was pointed in a general northerly direction?

A. That would be pointed east towards Marginal Way.

2353 Q. Well, it would be in the direction away from the Casein Building?

A. Yes.

2354 Q. Now, before the engine started to shove this large [fol. 296] box car in on the Casein Spur, was anybody flagging on Myrtle Street?

A. Newt Ellis was standing on the road when we started in, yes.

2355 Q. Was he standing on the road at the time the movement started by which the box car was to be shoved in and left on the Casein Spur?

A. Well, as to whether he was standing right on the road when this movement started, I don't know, but he was on the road because if he had not of been it was my duty to stay on the road, but he was there so I walked right in on the spur.

2356 Q. And where were you, about, when you walked in on the spur?

A. I was going into the first door at the Casein Company, where he was going to spot this car.

2357 Q. Have you any recollection as to what that distance is from the Myrtle Street paving over to the first door?

A. I would say, roughly speaking, that that would be about one hundred feet from the paving over to the first door.

2358 Q. How far from the paving does the Casein Building set, that is, the nearest side of or the nearest wall of that building to the Myrtle Street paving?

A. Well, I would say about fifteen feet.

2359 Q. Now, Myrtle Street, does that run east and west?

A. Yes.

2360 Q. And as the Casein Spur track crosses Myrtle Street, does that extend in a sort of southwesterly direction and northeasterly direction?

A. You start into it in a southwest or westerly direction.

[fol. 297] 2361 Q. But as the Casein Spur crosses Myrtle Street in a southwesterly direction, it sort of curves along the building?

A. That is right.

2362 Q. Now, this first door of the building that you headed for, there is a loading dock there, is there?

A. A loading platform, yes.

2363 Q. And that is along the westerly side of the building, is it?

A. That is right.

2364 Q. How far out from the wall of the building does that loading platform extend, approximately?

A. Well, I would say it is about a foot out from the building.

2365 Q. It might be less?

A. It could be less, yes.

2366 Q. What was your purpose in going to this door, the loading platform?

A. Well, I was to stand there and spot the doors of the box car right at this platform. In other words, I was to give the engineer or the fireman signals when to spot this car at the door in this spot.

2367 Q. While that movement was being made was Mr. Ellis in a position between you and the engine?

A. That is right, yes.

2368 Q. At the head of the engine was the tender and the box car that was to be set in?

A. No, the box car that was coming towards me was at the back of the engine.

[fol. 298] 2369 Q. The engine was backing in on that movement?

A. That is right.

2370 Q. And of course the box car was coupled onto the tender or tank of the engine?

A. Yes, sir.

2371 Q. Did you get over to this door?

A. Yes, I was standing at the door.

2372 Q. On which side of the track were you?

A. I was on the east side of the track.

2373 Q. From where you were standing could you see or observe Mr. Ellis?

A. From where I was standing I could not see him, no.

2374 Q. Could you see the engineer from where you were standing?

A. No.

2375 Q. So that in order to accomplish the work that you were about to do there, would you have to give the signal

to Mr. Ellis and Mr. Ellis transmit the signal to the engineer in order to spot the car which had to be spotted?

A. Not necessarily. As soon as that car passed Ellis or went beyond Mr. Buzard, the engineer, he would have a chance to pick me up. When he got around the curve he would be able to see me and watch me and not watch Newt.

2376 Q. Before this accident occurred had you assisted in similar work on the Casein Spur?

A. Yes.

2377 Q. Did you have any reason to believe that Mr. Ellis would be working on the same side of the track as you were on?

[fol. 299] A. Yes, I thought that he would work on that side or if he was going over to the other side, he would have told me.

2378 Q. You had received no information or instruction from him that he would be working on any other side of the track except the side he was hurt on?

A. Well, after this movement was started I looked back and the last time I saw Newt he was on the engineer's side, so that is the side he worked on.

2379 Q. So you knew from that he would be working on that side of the track?

A. That is right.

2380 Q. Had you ever worked on the Casein Spur with Mr. Ellis before the day of the accident?

A. I can't say as to that. I don't remember.

2381 Q. Can you give us some description of the box car that was being shoved in there?

A. Well, after the accident, why there was measurements taken of that box car and I remember of looking at the stencil on the side of the box car and if I remember right it was a fifty foot six inch long car. As to other measurements, I can't remember of any other measurements on the car. When we were switching those cars there, or box cars, as far as I am concerned I did not look to see how big they are or anything like that.

2382 Q. Now at the time this box car was shoved in on the Casein Spur and the time it was taken out, was it partly loaded?

A. I can't say as to that. I don't know whether that was an empty car or loaded car. The doors were closed on both sides, as I remember it.

[fol. 300] 2383 Q. Do you know what the distance was from the center of that track over to the side wall of the building at the point where Mr. Ellis was injured?

A. No, I don't know the distance.

2384 Q. Were you present when any measurements were taken?

A. Yes, I was. There was measurements taken to that wall where he was hurt, but the only,—there is only one measurement that I can remember of that was not from the center of the track.

2385 Q. What is that?

A. I can't remember what the measurement of it was from the center of the track.

2386 Q. Well, were you present when measurements were taken of this same car that Mr. Ellis was hurt with?

A. Yes.

2387 Q. When was that?

A. That was the same night of the accident, probably two hours or an hour and a half or two hours after the accident.

The Court: We will adjourn until 1:30 this afternoon.

(Court reconvened at 1:30 P. M., pursuant to adjournment, and hearing of the above entitled cause was resumed, Mr. Mecham continuing with the reading of the direct examination of Mr. J. C. Brown, a witness for the plaintiff):

2388 Q. Were any measurements or observations made as to the amount of clearance there would be at a point at the center of the car over to the side wall of the building where Mr. Ellis was hurt?

[fol. 301] A. Yes, there was measurements taken there.

2389 Q. And do you know what that measurement was?

A. I think the nearest spot, if I remember right, was ten and a half inches.

2390 Q. Now, those tracks in there, they had been in there for a long time had they not?

A. As far as I know, yes.

2391 Q. For what length of time had you been familiar with that piece of track?

A. Well, I went to work for the company on October 30th, 1942, and I imagine a week or two after I went to work for the company, I was up there on that spur.

2392 Q. And as that spur leaves or crosses Myrtle Street and proceeds along the Casein Building there in a southerly direction, that track is sharply curved, is it not?

A. Leading into the Casein Company going south, that has a curve, yes.

2393 Q. How would you describe that curve?

A. Well, it starts in and curves all around the building there.

2394 Q. Well, is that a gradual curve or a sharp curve?

A. I would say that that was a gradual curve.

2395 Q. Is it a short curve?

A. Yes, it is a short curve.

2396 Q. I don't suppose you would know what the degree of the curve is, would you?

A. No, I don't.

2397 Q. Now, with a fifty foot box car being shoved in on that Casein Spur track and around that curve, had you ob- [fol. 302] served whether or not some portion of the side of the car would come closer to the building than would the head end of the car?

A. Well, most of us working on the ground know that the center of the car comes closest to the building, either the center or the roof.

2398 Q. Did you yourself know that there was very little clearance between any car, especially a fifty foot car being moved over that track?

A. Well, we reached in and pulled out two cars and I never gave it a thought. We pulled it out so we thought we would put it back in again.

2399 Q. Do you know what the overhang is of a fifty foot car?

A. No, I don't know.

2400 Q. Did you, yourself, know or can you state approximately what the width of that car was that was involved in that accident?

A. Well, it looked just like a standard car to me. I don't know what the width of them are, of any car.

2401 Q. Had you had occasion to observe the condition of the Casein Spur track?

A. Well, when I walked in, why, I did not pay particular attention to the track but you do look at it and see there is no broken rails or anything like that.

2402 Q. Were there high and low points in the track?

A. Not as far as I know there was not. There was not anything low enough to catch my attention, or high enough.

2403 Q. Well, that track was not in the same condition of a main line track or track in the Argo yards, was it?

[fol. 303] Mr. Hamer: I will withdraw the objection noted.

A. Well, it is not in the same condition. Out on the main line they use heavier steel out there.

2404 Q. Well, could you see by looking at the track that it was an old track and more or less uneven?

Mr. Hamer: I will withdraw the objection noted.

A. Well, I have answered the question that I did not notice anything unusual about the track. It is the same as all along the lead on what they call the King County Lead, the tracks are all the same along there.

2405 Q. Well, can you tell us whether or not those tracks are more or less uneven?

A. Well, they are in the same condition that any tracks on any industrial spur are in. They work on them every day and put cars in on it but they are not like they are on the main line. Out on the main line, why, the tracks are kept up better on any railroad, heavier steel and better equipment.

2406 Q. Well, were the tracks in such condition so that a car would sway and pitch or lurch some?

A. No, if you was going over the tracks at a high rate of speed I believe it would pitch and lurch, but going at a low rate of speed I know that they don't.

2407 Q. Well, what would cause cars to sway and pitch and lurch on that track?

A. Going at a high rate of speed.

2408 Q. Well, what condition was the track in that would cause cars to pitch or lurch or sway?

A. If the tracks were low or uneven, as you put it, why, then going over them at a high rate of speed would cause the cars, I imagine, to pitch and lurch.

[fol. 304] 2409 Q. Well, were those tracks high and low and uneven in spots on that Casein Spur?

Mr. Hamer: I will withdraw the objection noted.

A. I don't know how I could explain that any better.

2410 Q. Well, you were out on the Casein Spur track last week at the time that Mr. Buzard was there, and Mr. Watts?

A. Yes, I was down there.

2411 Q. At that time were the tracks in the same condition as they were at the time of the accident?

Mr. Hamer: I will withdraw the objection noted.

A. The tracks looked the same to me down there now as when this all took place. Whatever condition they are in now I would say they were in the same condition at the time of the accident, as far as I know.

2412 Q. Had you ever observed any section men working in and about that Casein switching track?

A. I never have, no.

2413 Q. Now, on March 15, 1943, the day of the accident, did you know what the condition of the ground generally was with reference to the tracks located there?

A. If I remember right, why, it was dry. We had not had any rain. I am not positive about that, but that is the way I remember it now, but it was dry like the last two or three days have been, there was no hard rain, as I remember.

2414 Q. Well, in March can you tell us whether or not the ground is usually somewhat moist in that vicinity?

A. Well, that I can't say. That is all filled in, as far as I know, with sand, and as a rule sand absorbs the water and does not leave it soggy.

[fol. 305] 2415 Q. Is that rather low ground?

A. That whole industrial site is what I would call low and it has been filled in.

2416 Q. It is filled in ground?

A. I think it has been. I don't know that, but I understand that all of the tideflats down in South Seattle has been filled in. As to whether or not it is or not, I am not sure.

2417 Q. Is this in that territory that embraces the tideflats?

A. I think it could be called the tideflats in there.

2418 Q. Now, in on that Casein Spur, are there any remnants of an old track there.

A. Yes, sir, there is.

2419 Q. What is there in there?

A. Between the Casein Spur and the building to the west, which I think is the Continental Can Company, why, there is some rails leading off from that track, but I don't believe they are attached to the Casein Spur, as I remember it.

2420 Q. Well isn't there a frog in there?

A. I can't remember any frog there. If it is there I haven't noticed it.

2421 Q. Isn't there a frog in the Casein Spur track right near where Mr. Ellis was hurt?

A. As far as I know there is no frog there, no.

2422 Q. You don't remember seeing that when you were there last week?

A. When I was there last week I did not go over that ground thoroughly. I was sitting in an automobile. It was raining, and we were sitting at the corner of the building.

2423 Q. Well, when you were there last week were any cars sitting in on the Casein Spur?

[fol. 306] A. I don't know. I don't believe there was.

2424 Q. When did you learn that Mr. Ellis had met with an accident, an injury, on March 15th, 1943?

A. I was standing at that door and I was watching the car come towards me, the end of the car, and the car stopped after he had crossed the Myrtle Street road and just as that stopped I heard somebody holler and knew something was wrong because he had already got across the street, so I walked on back there and found Newt pinned in between the car and the building and he was facing me.

2425 Q. At the time you got there did you speak to him?

A. Yes. I don't remember what I said, but I spoke to him.

2426 Q. Did he speak?

A. He could not talk.

2427 Q. You could see he was crushed in there between the side of the car and the building?

A. Well, he was facing me, and his hands, as I remember it, were up in a position something like this, (indicating), and his eyes were rolled back and his glasses were rolled down over his chin, and his hat was on one side of his head and down on one shoulder, and to me it did not look like he was breathing. I really thought he was dead.

2428 Q. He was in an upright position?

A. He was in an upright position, yes.

2429 Q. Was he caught in there?

A. He was squeezed in there very tight. I tried to get in and get my hand between his shoulder and the building and the other hand between the car and his shoulder to see if I could not work him out of there, but I could not get my [fol. 307] hand between the shoulder and the building and the car and the building and I could not move him at all. He was wedged in there and the only thing I thought I

could do was to roll him up the way he walked in, and as I say, I thought he was dead, and if he was not dead the first thought that came to me was that he soon would be if he was left in that position, so I hollered up to the engineer to pull up ahead a little bit.

2430 Q. You hollered to the engineer to pull up a little bit, you mean towards Myrtle Street?

A. Going back across Myrtle Street, yes, sir.

2431 Q. Could you see the engineer from where you were with Mr. Ellis?

A. No, I could not.

2432 Q. So you hollered to him?

A. I hollered to him, and if I remember right, Mr. Fields passed on the word. Of course, I was made a little nervous at the time and I was trying to do something quick and I knew Mr. Fields was on the other side of Newt but I could not see Mr. Fields, so I heard him scuffle around between the building and the car, so I hollered.

2433 Q. How long was Mr. Ellis caught in the position he was before you got him out, before he was released?

A. Well, it seemed to me like we got him out awfully fast. I don't believe he was in there over two or three minutes at the most, between the car and the building, squeezed.

2434 Q. Well, when you hollered to the engineer to pull ahead, did he do that?

[fol. 308] A. I saw that at first I did not have a chance to get him out that way and the only way was to pull ahead, so I says, "You have to pull ahead", being he was up there I do not think he knew what was going on, and I could not see any earthly way to get him out because we could not work him out to the doors of the car because they were closed and I could not pull him into the car, and when he says, "Can I" — (interrupted)

Mr. Hamer: I will withdraw the motion to strike.

2435 Q. Do you know whether or not any indentation was made in the side wall of the building at the point where Mr. Ellis was caught?

A. Right where he was caught there was an indentation I don't believe was there before he was caught in there. I think that the squeeze made the dent in the building.

2436 Q. What is that?

A. I think the squeeze made the dent in the building, that he did make the dent in the building, yes.

2437 Q. And it was where that dent in the building is that you found him?

A. That is right, yes.

2438 Q. How high above the ground was the dent in the building?

A. Well, — (interrupted).

2439 Q. Or with respect to Ellis' person?

A. I would say that that was about five feet from the ground, around five feet to the indentation.

2440 Q. And what part of his body was opposite that indentation?

A. I imagine that would be his shoulders.

[fol. 309] 2441 Q. Now, with respect to the ends of the car, what was his position where he was caught?

A. I do not fully understand what you mean on that.

2442 Q. Perhaps I can make that a little bit more clear. At the time you found him caught and crushed and fastened between the side of the car and the building, how much of the front or forward end of the car had got by him?

A. I would say that he was caught just about the middle of the car.

2443 Q. Now, instead of moving the car ahead, could he have been released by moving the car in the direction in which it had been going when he was caught in there?

A. I was afraid that if I done that that it would keep rolling him around between the car and the building, smashing him all up if we continued to roll him in that manner.

2444 Q. Well, as you went south of the point where he was caught would the clearance become wider or narrower?

A. It becomes wider there, but it also becomes wider the way he walked in, and I thought the logical thing to do was to roll him out the way he walked in.

2445 Q. Well, did it appear to you that he was caught where the clearance was narrowest between the building and the side of the car?

A. I believe that that would be the narrowest point, yes.

2446 Q. And the narrowness there would have to be due to the fact that the car was rounding a curve?

A. Yes.

[fol. 310] 2447 Q. How far was he rolled after you started to release him?

A. If I knew just how far, — just how wide he was across the chest, why, I could answer that I believe, right to the

inch. He was turned back half of the width of his body and I would say possibly two or three inches further, and that is when I hollered at the engineer to back up and I do not think that he even backed up. I thought that the slack rolled back, because he came back right away. The engineer acted right away and I was under the impression until I heard him say he backed up, I was under the impression that the slack backed up and released him.

2448 Q. When you got there the car was standing still?

A. Yes, sir.

2449 Q. How far was it moved from that standing position?

A. I would say about fourteen inches, moved ahead.

2450 Q. That would be toward Myrtle Street?

A. That would be toward Myrtle Street.

2451 Q. Did the car come to a standstill then after they moved ahead about fourteen inches, it stopped?

A. Yes.

2452 Q. Were you able to release Mr. Ellis at that time?

A. No, not until it rolled back. Well, I would say three or four inches back and then we got, Mr. Fields and myself got underneath the car and got hold of his legs and pulled him down. He was facing the car and we pulled him under.

2453 Q. Well then, after the car was moved ahead fourteen inches, then it was moved back or towards the south a few inches?

A. It was moved back about three or four inches, yes.

2454 Q. Then you managed to pull him — (interrupted)

A. Free him.

[fol. 311] 2455 Q. Down?

A. Yes, sir.

2456 Q. And get him on the ground?

A. Yes, sir.

2457 Q. How long did he remain there?

A. We laid him on the ground and I ran on up to the engine and the engineer was not in the engine, so I went through the gangway there over on to the other side and I seen the engineer out on the street and I hollered to phone for an ambulance, and he says, "I have sent the fireman to phone for one." And I says, "We better doublecheck and make sure it gets here right away", so we walked over to the Tyee Lumber Company office and the door was open and we phoned the ambulance and they said they had already received the call.

2458 Q. When you laid Mr. Ellis down was that opposite the building?

A. It was alongside of the car, right alongside of the car.

2459 Q. Was the car moved out of there when the ambulance came?

A. After we made this phone call, why, I went on up to East Marginal Way to direct the ambulance down to the scene of the accident, and the car was moved while I was gone.

2460 Q. Did you go to the hospital with Mr. Ellis?

A. No.

2461 Q. What is your recollection as to the time of day when the accident occurred?

A. It happened right around 7:00 o'clock, because we looked at our watch.

2462 Q. Well, around 7:00 o'clock. Might that be about 7:30?

A. No, that would be three or four minutes one way or the other.

[fol. 312] 2463 Q. Did you make any record or memoranda of the time it happened?

A. I did not, no.

2464 Q. Well, you are speaking simply from your recollection of it now?

A. I am speaking of it as the way I remember it, yes.

2465 Q. Do you remember whether or not Mr. Ellis had his lantern with him at the time he was hurt?

A. He did not.

2466 Q. Did you see his lantern afterwards?

A. I believe I am the one that took the lantern to the yard office and I took it off the engine when we came back into the yard to tie up, and I had that lantern down in my locker in Argo for some time. I went down to take a job in Tacoma and I gave that lantern to a man but I don't know who it was now.

Mr. Tautges: That is all.

Cross examination.

By Mr. Hamer:

2467 Q. Was it after the accident, Mr. Brown, that you found Mr. Ellis' lantern on the engine?

A. It was when we were taking the engine to the barn after the accident, yes.

2468 Q. Did you find it in the place it was customarily kept?

A. Yes, sir.

2469 Q. Did you have your lantern with you?

A. No.

2470 Q. Now, do you remember what railroad the car belongs to?

[fol. 313] A. I believe it was and R. I.,—Rock Island.

2471 Q. And you do recall, do you, definitely of trying to put your hand between some portion of Mr. Ellis' body and the doors of the car?

A. Yes, I remember that.

2472 Q. So that it was a part of the door of the car at least that was against Mr. Ellis?

A. That is right.

2473 Q. Your recollection is that the doors were closed?

A. They were closed.

2474 Q. Had you operated the doors any time immediately before the accident to close them?

A. No.

2475 Q. Do you recall whether the doors were closed or open at the time you went in to pick up the two cars to take out?

A. I did not get that.

2476 Q. (Last question read).

A. The doors were closed when we went in and got the cars.

2477 Q. Now, you got in there and saw Mr. Ellis and saw the situation that he was in; did you use your best judgment as to the instructions to give the engineer to extricate him?

A. I done everything that I humanly could. I thought if I had it to do over again I can't think of a better way to do it than I done it.

2478 Q. You were concerned with his welfare, weren't you?

A. Absolutely.

2479 Q. You were trying to get him out as quickly and easily and harmlessly as possible, is that true?

[fol. 314] A. Yes, sir.

2480 Q. Did you that evening observe whether there was a sign down near the corner of the Casein Building and between the building and the Casein Spur track upon which board the legend "Impaired Clearance — (interrupted).

Mr. Tautges: I will withdraw the objection.

A. Yes, I saw that sign.

2481 Q. How long, to your knowledge, had the sign been in the same position?

A. As far as I know it was always in that position all of the time I have worked for the company.

2482 Q. Did you make any observation at all, Mr. Brown, as to whether a portion of the Casein Building extended out a distance of some ten or twelve inches or such a matter towards the track and just a short distance north or northeast of the place where you found Mr. Ellis?

A. There is a sort of a jumping off place there. It goes to one curve and extends a little bit further and goes around another curve, if that is what you mean. It would extend out there, I would say, maybe a foot.

2483 Q. I don't suppose you made any record, yourself, of the number of the car?

A. No.

2484 Q. And as I understand it, that same evening before you left the scene of the accident and after the ambulance had taken Mr. Ellis to the hospital, the car was respotted?

A. That is right.

2485 Q. And was it re-spotted in the same position, so far as you could observe, that it was in at the time Mr. Ellis was injured?

[fol. 315] A. It was just as close as we could possibly get it, if it was not exact.

2486 Q. And then, as I understand, following that there were some measurements made in your presence but you did not make any record of what they were?

A. No.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

2487 Q. Mr. Brown, after you were subpoena-d as a witness, did you talk with the claim agent about the case?

A. I had a notice in my letter box in Argo to come to this *supposition* March 3rd. I got that before I got the subpoena, and I think the subpoena, I got the subpoena the day before I went down there. I got that on March 2nd, if I remember right.

2488 Q. You got the subpoena the day before you went down there?

A. I got the subpoena the day before I went down there, but I had been given a notice to go down there before I received the subpoena. I believe I have that at home in writing yet.

2489 Q. When you say before you went down there, you mean you went back to the scene of the accident?

A. Just how do you mean that?

2490 Q. Well, after you got the subpoena requiring you to be here for the taking of your deposition you did go down to the scene of the accident with Mr. Watts, did you?

A. Yes, sir.

[fol. 316] 2491 Q. The claim agent, with this other gentleman that the engineer, Mr. Buzard, mentioned in his testimony?

A. That is right.

2492 Q. And at the scene of the accident did you discuss to some extent the facts and circumstances of the accident?

A. Yes, we did.

2493 Q. And that was preliminary preparation to the giving of your deposition?

A. I would not say that. We showed them where the accident happened and this gentleman here read the statement, the typewritten statement that they had of the accident the way I saw it on March 15th.

2494 Q. Well, shortly after the accident Mr. Watts, or some representative of the railroad company had taken a written statement concerning the facts and circumstances of the accident?

A. That is right.

2495 Q. And you refreshed your recollection from that statement, did you?

A. Well, something like that. You remember a good deal of it, I do, I probably can't remember all. I don't know all of the details about it yet, but I remember the cause and how it happened mostly and that is still in my memory, yes.

2496 Q. And before you sent to the scene of the accident last week did you first meet at the yard office?

A. No.

2497 Q. Where did you meet Mr. Watts?

A. We met him out there at the Casein Company.

2498 Q. You met him there at the Casein Company?

A. Yes, I was instructed to go out there.

[fol. 317] Mr. Tautges: That is all.

Recross examination.

By Mr. Hamer:

2499 Q. You went to the scene of the accident with Mr. Buzard and Mr. Field and yourself, is that right?

A. No, I went out there and met Mr. Buzard and Mr. Fields after I got there.

2500 Q. You went alone?

A. I drove out there and Mr. Buzard was already there and Mr. Fields just walked up.

2501 Q. And then after all three of you were there, then Mr. Watts and I arrived on the scene?

A. Yes, sir.

2502 Q. You did not go there with Mr. Watts or you did not go there with me?

A. No.

2503 Q. Was that the first time you had ever seen me?

A. The first time.

2504 Q. And did I ask you among other things about how this accident occurred?

A. Well, you asked.—well, we was talking about the accident and you asked questions on this accident.

2505 Q. And then before we got into the car do you recall if you and Mr. Buzard and Mr. Fields took me around and showed me the ground and pointed things out to me?

A. That is right.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

[fol. 318] 2506 Q. Before Mr. Hamer talked to you had you read your statement?

A. No, I read it at the time of signing it. I read it over then.

2507 Q. Or last week, did you read it?

A. No, I did not read it last week.

2508 Q. Did you see it?

A. Yes, it was read to me and I was looking over his shoulder and he read parts of it.

2509 Q. That was read before Mr. Hamer talked to you?
A. No, Mr. Hamer read it to me.
2510 Q. When you and Mr. Buzard and Mr. Fields met at the Casein plant last week, did you talk among yourselves about the accident and what you remembered of it?
A. When we was all there that is all we talked about, is the accident.
2511 Q. Did you sort of compare notes?
A. No, I am telling this just as I saw it.
2512 Q. But the three of you talked among yourselves as to what you saw and remembered and what you observed?
A. If you mean by the three of us Mr. Fields and Mr. Buzard, why, we had not. We had been talking about getting up so early in the morning and waiting for these two gentlemen.
2513. Q. Well, did the three of you talk at all with each other about the accident?
A. Since that accident has happened I am still working with that same engineer and that has come up at times about his getting hurt there, and when we go up there with [fol. 319] a new man that is the first thing we tell them, about the curve in there, because Newt got hurt in there. That is sort of a jinx, because every one is careful switching in there.
Mr. Tautges: That is all.

Recross examination.

By Mr. Hamer:

2514 Q. Just one further question, Mr. Brown. After I read your statement to you did I ask you if that was correct?
A. When you started to read that to me you said if there was anything in there that was wrong and I wanted it changed, now was the time to say so.
2515 Q. When I read it over, did you make any corrections?
A. I never made any corrections.
2516 Q. Was it a correct recital of the facts and circumstances that you knew about the accident?
A. Yes, it is just as I remember it now and that is the way I am telling it.
Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

2517 Q. This impaired clearance sign that is there now, do you know how long that particular sign has been there?

A. Well, on the question of that particular sign, there has been a sign there all of the time, and as far as I know it is the same sign, but if it is a different sign, it is in the same place. As far as I know, it is the same sign, but it still looks the same to me.

2518 Q. You don't know whether that is the same sign or not?

[fol. 320] A. I could not swear that that was the same sign, but I personally think it is the same sign.

Mr. Tautges: That is all. Do you waive the signature, Mr. Hamer?

Mr. Hamer: Yes, I will waive this signature.

Witness excused.

[fol. 321] 2519 Mr. Tautges: We now offer in evidence the deposition of the witness, Melburn H. Estes, taken on behalf of the plaintiff at Seattle, Washington, March 7, 1944, before I. C. Walker, a Notary Public in and for the State of Washington, plaintiff being represented by Mr. W. A. Tautges and defendant being represented by Mr. R. B. Hamer.

Mr. R. B. Hamer: Mr. Estes is in the jurisdiction of the Court, Your Honor, at this time and will be present in the court room in a few minutes. We have no objection to his reading the deposition, but I just want to advise counsel that the witness is here and is available.

Mr. Tautges: Well, I think we might as well read it. It will probably be shorter than if he were called to the witness stand.

(The deposition of Mr. Melburn H. Estes having been offered in evidence on behalf of the plaintiff, the direct examination was read by Mr. Tautges as follows):

MELBURN H. ESTES a witness produced in behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Tautges:

2520 Q. Would you state your full name, please?
A. Melburn H. Estes.
2521 Q. And where do you reside, Mr. Estes?
A. 3232-15th South, Seattle.
2522 Q. That is in the State of Washington?
A. Yes, sir.
[fol. 322] 2523 Q. How long have you been a resident of this City?
A. Oh, about thirty years.
2524 Q. Are you in the employ of the Union Pacific Railroad Company?
A. Yes, sir.
2525 Q. In what capacity are you employed by that company now?
A. General yard master.
2526 Q. Were you so employed on March 15, 1943?
A. Yes, sir.
2527 Q. For what length of time prior to that date were you so employed?
A. Two years and three months.
2528 Q. Prior to that time what was your position with the company?
A. As a brakeman.
2529 Q. As general yard master do you have charge and supervision of the Argo yards?
A. I have.
2530 Q. Of the company here in Seattle?
A. Yes, sir.
2531 Q. I believe you were present when other witnesses testified this forenoon?
A. I was.
2532 Q. You heard the testimony of Mr. Brown and Mr. Buzard?
A. I did.
2533 Q. Are you familiar with the Casein Plant here in Seattle?
A. Yes, quite familiar.
2534 Q. The so-called Casein Spur track, were you familiar with that?
A. Yes, sir.

[fol. 323] 2535 Q. And have been familiar with it for what length of time?

A. Oh, about ten years.

2536 Q. Were you familiar with the clearance between that track and the Casein Building that is located on or near Myrtle Street?

A. Yes, I was.

2537 Q. How long had you been familiar with that?

A. Oh, ever since I have been here, ten years in the yard.

2538 Q. Have you ever worked in there as a brakeman or switchman?

A. I have.

2539 Q. Now, as general yard master, are the switchmen foremen or yard foremen under your control and charge?

A. Yes, sir.

2540 Q. Are you acquainted with the plaintiff, Newton W. Ellis?

A. Yes, sir, I am.

2541 Q. Did you have anything to do with appointing him as engine foreman or switchman foreman, whatever you call it?

A. Well, yes, I did.

2542 Q. Do you remember how long prior to March 15th, 1943, he had been in employ of the Union Pacific Railroad Company?

A. He was employed on March 4, 1942.

2543 Mr. Hamer: March 4th, or April?

A. April it is, April is right.

2544 Q. In what capacity was he employed at that time?

A. As a helper.

2545 Q. Was he later on promoted to a position as a foreman?

A. Yes, he was, on February 4th, 1943.

2546 Q. Was that February or March?

A. February.

[fol. 324] 2547 Q. In your position as general yard master of the Union Pacific Railroad Company, did you have charge and supervision in your capacity, of the Argo yards?

A. Yes, sir, I did.

2548 Q. Now this Casein Spur track that was mentioned this morning, is that within or adjacent to the Argo yard?

A. It is in the Argo yard, our switching district.

2549 Q. It is a part of your switching system?

A. That is right.

2550 Q. Did you exercise supervision over that track?

A. Yes, sir.

2551 Q. And in respect to any changes or repairs made on that track, did you have charge of that, or authority over it?

A. No, no, I did not. The roadmaster could make changes without any——

2552 Q. What is that?

A. The roadmaster could make changes without my permission.

2553 Q. Who is the roadmaster in charge?

A. Mr. Mallon was roadmaster at that time.

2554 Q. Who is the present roadmaster?

A. I don't remember his name just now. What is that fellow's name? I can't recall his name now. He is a new man here.

2555 Q. Well, the gentleman who was roadmaster at or about the time of the accident, where is he now?

A. He is here in Seattle. His headquarters are here.

2556 Q. What is his present position?

A. Assistant roadmaster.

[fol. 325] 2557 Q. Were you familiar with the condition of the tracks of the Casein Spur?

A. Yes, sir.

2558 Q. On March 15, 1943, or prior to that time?

A. I was.

2559 Q. Now at that time and for some time prior thereto those tracks were rather uneven and unlevel, were they not?

Mr. Hamer: I will withdraw the objection noted.

A. Not to my knowledge, no.

2560 Q. Did you have those tracks inspected from time to time?

A. No, I did not.

2561 Q. Did you have a section foreman whose duty it was to keep informed as to the condition of the tracks?

A. We have, yes.

2562 Q. What section foreman had charge of that?

A. Dan Boone.

2563 Q. And where does he reside?

A. In Seattle.

2564 Q. Is he still in the employ of the company?

A. He is.

2565 Q. When did you first become informed as to the accidental injury of the plaintiff, Mr. Ellis, on March 15, 1943?

A. At 7:20 P.M.

2566 Q. Did you make a record of the time?

A. I did.

2567 Q. After you were informed of the accident did you go to the scene of it?

A. No, I went to the hospital.

[fol. 326] 2568 Q. Did you later go to the scene of the accident?

A. After going to the hospital then I went out to the scene of the accident.

2569 Q. Do you remember what time you arrived there?

A. You mean at the scene of the accident?

2570 Q. Yes.

A. Well, it was around 8:30 or 8:45 in the evening. I am not exactly sure about that.

2571 Q. Was it dark at that time?

A. Well, yes, it was; it was quite dark.

2572 Q. When had you last been at that place in daylight?

A. Well, that day I had been by there several times.

2573 Q. Now, as I understand it, the Casein Spur comes off the Myrtle Street track and crosses Myrtle Street at somewhat of an angle and then curves around the Casein Plant Building?

A. That is right.

2574 Q. And ends out a short distance from Myrtle Street?

A. That is right.

2575 Q. Does that spur track extend for some distance south of the Casein Plant Building or not?

A. No, just about the edge of the Casein Building.

2576 Q. Were you at the time of the accident and also prior thereto familiar with the loading platforms or loading docks on the westerly side of the Casein Plant Building?

A. Yes, I was.

2577 Q. What is your recollection or knowledge as to how many box cars can be accommodated on the Casein Spur track?

[fol. 327] A. Well, you can spot three cars along the and there would be room for about three more, or a to of six cars altogether.

2578 Q. The room for the extra cars, would that be south of the third loading platform?

A. It would be west or north,—it would be east I suppose. The way we have been describing this trackage there, it would be east.

2579 Q. Well, assuming that Myrtle Street runs east and west and the Casein Spur generally north and south?

A. Well, it would be north in that case.

2580 Q. In other words, between the first loading platform and Myrtle Street?

A. That is right.

2581 Q. Now the Casein Spur, as it crosses Myrtle Street, angles to the southwest, does it not?

A. Yes, sir.

2582 Q. Is there some curve in the track as it crosses Myrtle Street?

A. Well, if I remember right it is just almost straight right across the street.

2583 Q. And after it crosses Myrtle Street does it start to curve sharply?

A. Well, not so much until you get thirty or forty feet from the pavement or edge of Myrtle Street.

2584 Q. That track could have been located a little further to the west after it crosses Myrtle Street, could it not?

Mr. Hamer: I will withdraw the objection.

A. I can't say as to that as it would not be up to the roadmaster or engineers to decide that.

[fol. 328] 2585 Q. Well, taking into consideration the track as it is located now, there was considerable open space on the westerly side of the track, was there not?

A. That is right.

2586 Q. And as far as room was concerned, or space, there was room enough to locate that track several feet further west than it is now located, that is west of the Casein Building?

Mr. Hamer: I will withdraw the objection.

A. I can't answer that as I don't know about the track, whether it could be moved or not.

2587 Q. Well, from your observation there do you know that there is sufficient room to move the tracks further away from the building, that is, at the point where the tracks start to curve?

A. There is a little space there in the corner to the pavement, between there and the pavement.

2588 Q. As a matter of fact, there was no necessity for so sharp a curve there, was there?

Mr. Hamer: I will withdraw the objection.

A. (no answer.)

2589 Q. That is, based upon your observations there.

A. I can't answer that as I am not a track man. I do not understand laying track and therefore I would not know.

2590 Q. How long had this Casein Spur track been where it was on March 15th, 1943, to your knowledge?

A. That I don't know. I don't know when the track was put in there.

[fol. 329] 2591 Q. When did you first become familiar with the Casein Spur track?

A. Oh, possibly ten years previous to the accident.

2592 Q. So for that length of time it has been located where it is now?

A. Yes, sir.

2593 Q. Do you know whether or not the Casein Plant Building has been reconstructed in recent years?

A. Well, if I remember right they had a fire some years ago, but I don't know just what changes was made in the building. I was not here at the time.

2594 Q. Well, do you know whether or not the Union Pacific Railroad Company had anything to do with whatever changes were made in the construction and location of the building?

A. No, I don't know.

2595 Q. Did you make some investigation in respect to the accident a day or two after it occurred?

A. Yes, I had the crew in and secured statements from them regarding the accident.

2596 Q. Did you look at the box car that was involved in the accident?

A. I did.

2597 Q. What was the number and the initials of that car?

A. It was a Rock Island car. I have forgotten the number. I had all of my measurements and data on that car in a book and I lost the book. I can't find it, therefore I know it was a Rock Island car but forget the numbers.

2598 Q. Your company has a record of that car number?

A. Yes, sir,

2599 Q. Now, at the time of the accident, do your records show whether or not the car was loaded or empty?

[fol. 330] A. It was an empty car.

2600 Q. You think it was empty at the time of the accident?

A. Well, I looked into the car the next morning and the car was empty then.

2601 Q. But as to whether or not it was partly loaded at the time of the accident, do you know about that?

A. I don't know if it was or not.

2602 Q. Can you describe that car to us as to side and dimensions?

A. Well, it was a fifty foot car, fifty feet, six inches, an end over car, double doors.

2603 Q. What was its width?

A. Well, that I can't say. I have lost that book and I did have all of that in the book, but I cannot say just what the width is now.

2604 Q. But your company has a record of that?

A. Yes, sir.

2605 Q. What was its width, that you remember?

A. I don't know, I can't state, but possibly it was ten foot, seven inches, but I am not sure about that.

2606 Q. Was it a larger car than the average ordinary box car?

A. No, it was not.

2607 Q. At the time of the accident did you operate box cars forty feet in length?

A. Oh, yes.

2608 Q. Can you tell us whether or not a forty foot car was the average car or not?

A. Forty foot would be about an average length, yes.

2609 Q. And what lengths are there beyond forty foot cars?

[fol. 331] A. In box cars, you mean?

2610 Q. In box cars, yes.

A. Then we have the fifty foot, I don't know, I would have to look up the records on that.

2611 Q. Then do you have box cars more than fifty feet, six inches in length?

A. No, not to my knowledge, no.

2612 Q. Well, this particular box car then was about as large a box car as was operated?

A. Yes.

2613 Q. On the Union Pacific Railroad?

A. As far as I know, yes.

2614 Q. Now, these fifty feet, six inches in length cars, are they any wider than forty foot cars?

A. No, they are not. In regard to the length, there is a fifty-two foot box car, I remember that.

2615 Q. Well, our standard box cars, whether they are forty feet in length or more, are they all the same width?

A. Well, I can't say as to that. I would have to look it up in regards to their measurements.

2616 Q. Now, take this Casein Spur track, as you go in on that track from Myrtle Street——

A. Yes, sir.

2617 Q. And particularly where it is curved, can you tell us whether or not the outside rail or the outside track, which would be the westerly rail, is maintained at a higher elevation than the inside rail?

A. I think there is a slight elevation, not so much, I can't say as to how much, but there must be a little elevation there.

[fol. 332] 2618 Q. Yes, where there is a curving rail, on one side of the track it is always——

A. A little highter.

2619 Q. Than on the other side?

A. That is right.

2620 Q. And the high elevation, or the highest elevation in that track, is in the rail that is furthest west from the building, is it not?

A. That is right.

2621 Q. And a box car being shoved in on that track would list more toward the building than the side from the building, would it not?

A. Yes, it would slightly.

2622 Q. Where tracks are uneven and where there are low and high joints, that tends to cause some side sway and pitching and lurching of a car, does it not?

A. Well, it would if they were moving very fast, it would, yes.

2623 Q. If the roadbed itself is not firm, that would cause some side movement?

A. It probably would at the faster rate of speed.

2624 Q. Well, there is always less motion in a car when it is being run upon a firm level track than there is when it is being run on an uneven track with low and high joints?

A. There naturally would be, yes.

2625 Q. Did you make some measurements with respect to this particular car that Mr. Ellis was injured by with respect to the clearance between the side of that car and the building?

A. I did.

[fol. 333] 2626 Q. Have you those measurements?

A. No, I have not. As I stated before, I lost my note book that I kept those in and I have not been able to find it yet.

2627 Q. Did you, in the course of your investigation, measure the narrowest distance between the side of the car and the building?

A. I did.

2628 Q. As I understand it, you had the car spotted at approximately where it was when Mr. Ellis was hurt?

A. Yes.

2629 Q. And at what point was the narrowest clearance, having regard not only to the distance between the building and the side of the car, but also taking into consideration the ends of the car at that time?

A. Well, it was right about the middle of the car.

2630 Q. What is your recollection as to what that distance was?

A. It is somewhere around ten inches. I don't know exactly, the exact measurement.

2631 Q. Was not it somewhat under ten inches?

A. Well, I won't say as to that. I don't remember the exact measurements.

2632 Q. Your company has a record of that measurement?

A. Yes, sir.

2633 Q. Did you find any indentation in the side wall of the building where Mr. Ellis was hurt?

A. I did.

2634 Q. Will you describe that indentation?

A. Well, there was a dent in the metal about five feet from the ground. The metal was bulged in towards the [fol. 334] interior of the building and I was told that it was where he was injured, although I did not see it.

2635 Q. At the time you made your measurements, were some of the crew present that were working with Mr. Ellis?

A. No.

2636 Q. Well, when you had the car spotted for the purpose of making the measurements, you did have some information at that time as to where the car was at the time Mr. Ellis was hurt?

A. Yes, I did.

2637 Q. Who did you obtain that information from?

A. From the assistant general yard master, S. O. Ross.

2638 Q. Now when you made the measurement to obtain the narrowest distance, or clearance, was a car set at that time so that the center of the car from one end to the other was approximately opposite this indentation in the side wall of the building?

A. That is right.

Mr. Tautges: I believe that is all.

Cross examination.

By Mr. Hamer:

2639 Q. Mr. Estes, were you the man that gave the directions to the engineer to spot the car at the place where it had been, or had some one else done that before you arrived?

A. Some one did that before I arrived.

2640 Q. You did not give the spotting instructions?

A. No, I did not.

2641 Q. As I understand it, then when you arrived on the scene of the accident, the car was in the position which you have described, but the engine was no longer there?

[fol. 335] A. That is right.

2642 Q. Now, then, when you examined the car the following morning, at which time you stated it was empty, was the car then in the same position on the Casein Spur track that it had been the night before when you had seen it?

A. The same spot.

2643 Q. And it was at that time that you ascertained that it was empty?

A. That is right.

2644 Q. Did you open the doors?

A. The doors were partly open.

2645 Q. Did you open them any further?

A. No, I did not.

2646 Q. Did any one else there in your presence open the doors further?

A. No.

2647 Q. I see. When you examined the car the previous evening were the doors open or closed, do you recall?

A. I do not recall if they were open or closed at that time.

2648 Q. Are there a number of places in or about the Argo yards, or at least in the zone where the Union Pacific Railroad Company handles the switching where the clearance is impaired between cars and fixed structures such as buildings and loading platforms?

A. Yes, we have several places.

2649 Q. Are you familiar with the fact that the present Casein Building which is located immediately to the east of the Casein Spur track was constructed in 1936?

A. That, I don't know.

[fol. 336] 2650 Q. I see. Do you know whether or not the distance from which spur tracks or industrial tracks generally are situated with respect to the building depends, at least in part, upon the particular accommodations that are required by the individual shipper, or people that are located in that industry?

A. Yes, that is right.

2651 Q. How frequently do you have occasion to operate in switching movements those fifty foot, six inch cars?

A. Well, quite frequently.

2652 Q. Is there anything rare about a car of that kind?

A. No, there is not.

2653 Q. Are cars of that sort handled daily?

A. Yes, they are.

2654 Q. And are cars of that type or size restricted to any particular tracks or particular industry?

A. No, they are not.

2655 Q. Do you know, Mr. Estes, what the ordinary length of an automobile box car is?

A. Well, it is about a fifty foot car, as a rule.

2656 Q. Isn't that the standard length for an automobile car?

A. That is right.

2657 Q. And was this Rock Island car an automobile car?

A. It was.

2658 Q. Do you know whether or not it has written "Automobile" upon the side of the car?

A. On this particular car, I don't remember if it was or not.

2659 Q. How then did you know it was an automobile car?

A. Automobile cars have double doors and they are end and end doors.

[fol. 337] 2660 Q. And this car did have that type of doors?

A. Yes, sir.

2661 Q. Now as the car was setting there on the track, do you now recall which end of the car, bearing in mind the nor*ht* end or south end,—which had the end doors in it?

A. It was the south end.

2662 Q. And is the brake then located at the opposite end?

A. That is right.

2663 Q. The brake end of the car was then to the north?

A. That is right.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

2664 Q. Well, these so-called automobile cars are not restricted to automobile loads, are they?

A. No, they are not.

2665 Q. They are used for all types of loading?

A. Yes, sir.

2666 Q. There is one question I forgot to ask you and that was with respect to the matter as to whether or not there is an old frog or the remnants of an old frog on the Casein Spur track?

A. There are some rails there,—I am not sure if there is a frog there or not. I am not positive about that.

2667 Q. A number of those rails are between the rails of the Casein Spur track?

A. That is right.

2668 Q. A number of those rails extend a short distance to the west?

[fol. 338] A. That is right.

2669 Q. Of the Casein Spur track?

A. Yes, sir.

2670 Q. And originally there was a track leading from the Casein Spur track to the Continental Can Building, was there not?

A. I believe there was, yes.

2671 Q. And those rails that are left there now, they are a part of the rails by means of which—

A. I presume they are.

2672 Q. You could get off the Casein Spur track on to the other track?

A. That is right.

2673 Q. Originally there was a switch of some kind in there, was there not?

A. Well, I am not sure about that. It must have been before my time. I don't know whether if there was a switch there or not.

2674 Q. Well, at any rate, there is no occasion or necessity now, nor was there at the time of the accident, to have those other rails where they are now?

A. No, not as I know of.

2675 Q. What?

A. Not that I know of, no.

2676 Q. That track leads off the Casein Spur track over to the Continental Can, that was abandoned some years ago, was it not?

A. That is what I understand, yes.

Mr. Tautges: That is all.

Recross examination.

By Mr. Hamer:

2677 Q. What kind of a track is it, that is, what do you call it as to the kind of a track it is that runs along there [fol. 339] in or parallel to Myrtle Street until it gets down to Fox Avenue?

A. King County Lead.

2678 Q. Now that lead track, is that used in connection with serving other industries other than the Casein Company?

A. Yes, sir.

2679 Q. At that point?

A. Yes, sir.

2680 Q. And do crews which operate in that particular area or zone of the yards have frequent occasion to pass along going one way or the other on this lead track you have referred to?

A. Oh, yes, they do.

2681 Q. Even though they may not be moving a car in or out of this Casein Company?

A. That is right.

Redirect examination.

By Mr. Tautges:

2682 Q. The Casein Spur, that leads off from what you call the King County Lead?

A. That is right.

Recross examination.

By Mr. Hamer:

2683 Q. One further question, Mr. Estes. As I recall on direct examination Mr. Tautges asked you as to whether or not this King County Lead and King County spur was a part of your switching system. I think those are the words he used. Did you mean by that it is in an area or zone in which the Union Pacific handles the switching movements?

A. That is in zone 5. The Union Pacific does all of the switching in that zone.

[fol. 340] 2684 Q. And is that what you meant when you answered his question, "Yes", that it is a part of the switching system?

A. That is right.

Redirect examination.

By Mr. Tautges:

2685 Q. Well, the Casein Spur track, that is in zone number 5?

A. It is, yes, sir.

2686 Q. And when that Casein Spur track needs repairs or fixing up, does the Union Pacific section men do that work?

A. Yes, sir.

2687 Q. And that has been true for a good many years?

A. Yes, sir.

2688 Q. Now that curve there in the Casein Spur as it rounds the Casein Building, that is a sharp, short curve, is it not?

A. Yes, it is rather a short curve.

2689 Q. And any car moving on that curve gets closer to the Casein Building, that is the side of the car gets closer to the Casein Building, as it hits and rounds the apex of the curve?

A. It does, yes, sir.

2690 Q. And the side of a fifty foot car would get closer to the building than the side of a forty foot car, would it not?

A. Yes, sir, it would.

Mr. Tautges: That is all.

Recross examination.

By Mr. Hamer:

2691 Q. The matter of having the rail on the outside of the curve higher than the rail on the inside is, of course, characteristic of all railroad tracks where there are curves, is it not?

[fol. 341] A. Yes, that is to keep the cars from derailing.

2692 Q. Well, it is commonplace, is it not?

A. Yes, it is.

2693 Q. Are there other places in the Argo yards or in the zone number 5 where a similar condition exists?

A. Yes, there is.

2694 Q. Are there other places where there are curves of the same kind or character as the curves in the Casein Spur track?

A. Yes, about the same in several places.

2695 Q. The fact that a car has the greatest overhang in its center at the apex of a curve is also characteristic in respect to all curves?

A. Yes, sir.

2696 Q. And all cars?

A. Yes, sir.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

2697 Q. Well, the sharper and shorter the curve is the greater is the tendency to crowd over toward a building or other structure?

A. It naturally would be, yes, sir.

2698 Q. Of course, on a track like the Casein Spur, the car and engine movements are always at a low speed, are they not?

A. That is right.

2699 Q. And where the speed is slow like one or two or three or four miles an hour, there is no necessity for having one track elevated any higher than the other, is it, even at a curve?

A. Well, the cars are more liable to climb over the rails if the tracks are real flat.

2700 Q. Now this frog, or the remnants of it, that is in [fol. 342] that Casein Spur track, the tendency of a car running on the track at that point would be to crowd it more toward the building too, would it not?

A. No, I don't think so.

Mr. Tautges: That is all.

Mr. Hamer: Nothing further.

Mr. Tautges: Do you waive the signature, Mr. Hamer?

Mr. Hamer: Yes, I will waive this signature.

Witness excused.

[fol. 343] The Court: We will take a short recess.

(Following recess, hearing of the above entitled cause is resumed as follows):

2701 Mr. Tautges: We will offer in evidence the deposition of H. B. Coburn, taken on behalf of the plaintiff, at 914 Insurance Building, in the City of Seattle, Washington, on March 7, 1944, before H. C. Walker, a Notary Public within and for the State of Washington.

(The deposition of H. B. Coburn having been offered in evidence, same was read as follows):

MR. H. B. COBURN, a witness called and sworn on behalf of the plaintiff, to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Tautges:

2702 Q. Mr. Coburn, what is your full name, please?

A. H. B. Coburn.

2703 Q. Are you a resident of the City of Seattle and State of Washington?

A. I am.

2704 Q. How long have you lived here?

A. About twelve years.

2705 Q. Have you some connection with the Union Pacific Railroad Company?

A. I am employed by them.

2706 Q. What position do you hold with the company?

A. Assistant superintendent.

2707 Q. Now, as assistant superintendent what in a general way are your duties and authority?

[fol. 344] A. I am charged with the operation of trains in the movement of trains here in Seattle and the district from Tacoma and Fort Lewis and north.

2708 Q. Did you hold that position on and prior to March 15, 1943?

A. I did.

2709 Q. Now, yard masters and road masters of the Union Pacific Railroad Company here at Seattle, are they under your supervision and direction?

A. The yard masters are directly under my supervision. The road masters are indirectly under my supervision.

2710 Q. Were you familiar with the Argo yards?

A. I am.

2711 Q. And have been for how long?

A. For about twelve years.

2712 Q. Are you familiar with the tracks that the Union Pacific Railroad Company uses and on which it operates and moves cars and engines in zone No. 5 here in Seattle, Washington?

A. I am.

2713 Q. What are the boundaries of that zone?

A. The operating zone called Zone No. 5 includes all of the tracks south of the crossing of the West Seattle Line which crosses the East Marginal Way tracks just south of Spokane Street.

2714 Q. Now, the Argo yards and the tracks for operating on in the vicinity of the Argo yards all are within Zone No. 5?

A. No.

2715 Q. Are you familiar with the location of the Casein Company plant here in Seattle?

[fol. 345] A. Yes.

2716 Q. Are you familiar with the spur track that serves that plant?

A. Yes.

2717 Q. And how long have you been familiar with that?

A. Twelve years, since I have been here.

2718 Q. Were you familiar with the clearance between the Casein Spur and the Casein Building near Myrtle Street?

A. Yes.

2719 Q. For what length of time had the Casein Spur been maintained along the Casein plant in its present position?

A. I am not sure whether it was moved until after the fire and prior to the Casein Company occupying the property.

2720 Q. Do you recall when it was that the Casein Company first occupied that property?

A. I do not remember the year, but it was shortly after the fire at the Fox River Butter Company.

2721 Q. Now, whatever work was done in reference to the maintenance and repair of that track was that performed by employees of the Union Pacific Railroad Company?

A. I am not sure about that.

2722 Q. Were those tracks, that is, the Casein Spur and other tracks used by the Union Pacific Railroad Company in Zone number 5, were they under your direct supervision or not?

A. The operation of them, yes.

2723 Q. Then with respect to the maintenance of them, what official of your company would be in charge of that?

A. The road master or the division engineer, who is over the road master.

[fol. 346] 2724 Q. How about the yard master?

A. He has nothing to do with the maintenance of the track except to report defects in it.

2725 Q. Now then, the section men, are they under the supervision of the road master?

A. Yes.

2726 Q. Do you have a safety engineer here in Seattle?

A. No.

2727 Q. Do you know who the safety engineer of the Union Pacific Railroad Company is?

A. We have a safety agent in Portland, if that is what you mean.

2728 Q. Do you know whether or not you have a safety engineer with headquarters at Omaha, Nebraska?

A. No.

2729 Q. That is, by that answer, you don't know whether there is such a one or not?

A. That is right.

Mr. Tautges: That is all.

Cross-examination.

By Mr. Hamer:

2730 Q. Mr. Tautges asked you, Mr. Coburn, whether you had been generally familiar with the clearance between the Casein building and the spur track, and as I recall, you testified you were generally familiar with it. What, if any, warning as respects clearance had been provided by the Union Pacific Railroad Company as regards that track prior to March 15th, 1943, if you know?

Mr. Tautges: I will withdraw the objection.

A. A standard sign lettered "Restricted clearance" was erected approximately on the north property line.

[fol. 347] 2731 Q. Do you know how long, to your knowledge, had there been such a sign in that location?

Mr. Tautges: I will withdraw the objection.

A. I don't know exactly when the sign was erected but it was in that approximate position for several years that I know of.

2732 Q. Now, do you recall at this time definitely, Mr. Coburn, whether the sign says "Restricted clearance" or "Impaired clearance"?

A. No, I don't.

2733 Q. Has there been, to your knowledge, any change made in either the location or the lettering of the sign within a day or two after March 15th, 1943?

A. I am not sure what has been done with it, but I do not believe anything has been done to change the sign.

Mr. Hamer: That is all.

Redirect examination.

By Mr. Tautges:

2734 Q. These standard restricted clearance signs that you speak of, what are they constructed of?

A. They are a rectangular board approximately fifteen inches by twenty-eight inches, painted white, with black let-

tering, erected on a post six or eight feet above the ground. The sign is six or eight feet above the ground.

2735 Q. How large is the lettering on those signs?

A. I would estimate that the height of the lettering is two and a half to three inches.

2736 Q. The post to which the sign is attached, what sort of timber or wood is that composed of?

[fol. 348] A. I don't know. It is painted. I imagine it is fir but I don't know, about 4 by 4. I haven't measured it.

2737 Q. And the posts, are they set in the ground like a fence post?

A. Yes.

2738 Q. And in the course of time they deteriorate and rot and have to be replaced?

A. They could.

2739 Q. Does your company have a record of when one of those posts is replaced by a sound post?

A. Possibly, but I do not believe so.

2740 Q. Do you know whether or not the posts are creosoted or painted or otherwise prepared?

A. No, I don't.

2741 Q. Now, at this location near the Casein Plant the soil is at times usually damp and moist, is it not?

A. It frequently could be, yes.

2742 Q. And those posts on exposure to the elements rot out from time to time do they not?

A. The weather causes a rotting condition in all wood, I suppose.

2743 Q. Have you any standard on the Union Pacific Railroad as to the height that the sign itself should be above the working level?

A. I am not sure about that.

Mr. Tautges: That is all.

Mr. Hamer: That is all.

Mr. Tautges: Do you waive the signature?

Mr. Hamer: Yes, I will waive the signature.

Witness excused.

[fol. 349] 2744 Mr. Mecham: Plaintiff offers in evidence the life expectancy tables under the column American, opposite the age 42 years, the expectancy given 26.72 years.

Mr. Tautges: Plaintiff now rests, Your Honor.

Mr. Hamer: Will the Court excuse the Jury for a few minutes? We desire to make a motion.

The Court: The Jury will be excused for a short time.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

2745 Mr. R. B. Hamer: Comes now the defendant, after Plaintiff has announced his rest, and reserving the right to offer evidence in the event that the Court determines that any issue of fact exists, moves the Court to dismiss the Jury and enter judgment in favor of the defendant, or, in the alternative, to instruct the Jury to return a verdict in favor of the defendant, for the following reasons:

1. That under all of the evidence the plaintiff is not entitled to judgment.

2. That there is a total failure of any sufficient evidence to establish any negligence upon the part of the defendant.

3. There is a failure of proof with respect to the establishment of any negligence upon the part of the defendant as the proximate cause of injuries sustained by the plaintiff.

4. For the reason that the evidence conclusively establishes that the plaintiff was guilty of contributory negligence which was the sole proximate cause of any injury or damage sustained by the plaintiff.

5. For the reason that the evidence affirmatively establishes that plaintiff had been warned that clearance was [fol. 350] impaired between the Casein Building and the Casein Spur track, by the presence of a sign located between said track and said building, and near the northwest corner of the building, which is now affirmatively established by the evidence.

6. For the reason that negligence upon the part of the defendant cannot be predicated upon the distance which existed between the Casein Spur track and the Casein Building, the same being matters which involve questions of engineering and which are not for determination by courts and juries.

7. For the reason that there is a total failure of any proof that the tracks were improperly or negligently located or maintained, such proof not being established from the mere condition which existed.

8. For the further reason that there is no evidence to support any of the allegations of negligence set forth in the Plaintiff's petition.

(Argument of counsel on Defendant's motion as stated above).

The Court: I will overrule the motion at this time.

Defendant excepts.

(The Jury is recalled to the jury box).

(And the Defendant, in order to maintain the issues on its behalf to be maintained, adduced evidence as follows):

[fol. 351] 2746 Mr. T. F. Hamer: The Defendant offers in evidence the deposition of M. Ewold Theodore Leonardson, a witness produced on behalf of the plaintiff, which deposition was taken in Seattle, Washington, March 7, 1944, before H. C. Walker, a Notary Public within and for the State of Washington.

(The deposition of Mr. M. Ewold Theodore Leonardson having been offered in evidence, same is read as follows):

M. EWOLD THEODORE LEONARDSON, a witness produced on behalf of the plaintiff, and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Tautges: (Read by Mr. T. F. Hamer).

2747 Q. Mr. Leonardson, what is your full name?

A. M. Ewold Theodore Leonardson.

2748 Q. Do you reside in Seattle, Washington?

Mr. Hamer: There was an objection here, which is withdrawn.

A. Yes, sir.

2749 Q. Have you some connection with the Casein Company of America?

A. Yes, sir, I have.

2750 Q. Does that position require the performance of duties for the company here at Seattle, Washington?

A. Yes, sir.

2751 Q. Where are you employed with the Casein Company?

A. 701 Myrtle Street.

2752 Q. Let's see, I believe you have been present at the taking of the depositions of other witnesses?

A. Yes, sir.

[fol. 352] 2753 Q. Here today?

A. Yes, sir.

2754 Q. And did you hear the testimony of those witnesses with respect to the Casein Company Plant and the Casein Spur track?

A. Yes.

2755 Q. Are you familiar with the location of those tracks and also the building of the Casein Company Plant?

A. Yes.

2756 Q. Is that the place where you are employed?

A. Yes.

2757 Q. And in what capacity are you employed by the Casein Company?

A. Superintendent.

2758 Q. What?

A. Superintendent.

2759 Q. As superintendent of that company, what duties do you have?

A. I am in charge of all of the men in the factory.

2760 Q. What?

A. I am in charge of all of the men in the factory and all of the work they perform.

2761 Q. And have you any duties to perform with respect to cars that are brought in on the Casein Spur?

A. Well, I advise them where to spot them and also notify the yard when they are empty or loaded, whatever it happens to be.

2762 Q. Can you tell us how many cars that Casein Spur track will accommodate along your budilding there?

A. Well, it will accommodate three for loading and unloading, we have three loading platforms, but if you wanted to store a car or two in there, I believe you could. If those cars were not spotted at the platforms I think they could [fol. 353] line up five of them, in other words.

2763 Q. Were you informed in regard to the accident in which one Newton W. Ellis was injured on that Casein Spur track on March 15th, 1943?

A. Well, the first I heard of it was when the morning switch came in the following morning.

2764 Q. When the morning switch came in the following morning?

A. Yes, and one of the crew told me about it then.

2765 Q. Do you know whether or not that car was spotted some time during that day at or about the place where Mr. Ellis was said to have been injured?

A. No, I don't. I don't know where the car was spotted. I don't remember.

2766 Q. Did you observe some of the railroad men take measurements or make an investigation?

A. Yes, I did.

2767 Q. Did you observe what car they had when they were doing that?

A. I did not pay any attention to it at the time, but after the case got along he came in and asked a few questions and we finally did find out what car it was. I did not pay any attention to it that day.

2768 Q. Do you recall when that car first came in on the Casein Spur track?

A. No, I don't.

2769 Q. Do you recall whether it came in as a loaded car?

A. It came in as a loaded car.

2770 Q. How was it to go out?

A. As an empty unless there was a possibility of us load-
[fol. 354] ing out a car if we got permission to use that car. I do not have any faint memory of that, but that has happened.

2771 Q. What was that car loaded with when it first came in on the Casein Spur?

A. With casein remnants.

2772 Q. What sort of material is that?

A. It is a by-product from a button.

2773 Q. What?

A. It is a by-product from the button industry.

2774 Q. Well is that heavy stuff or light stuff?

A. Oh, I think it is about the same as any other product we have there. I would not say it was heavier.

2775 Q. Does that come packaged?

A. Burlap bags and paper drums.

2776 Q. Approximately what does a full packaged bag, as it comes in, weigh?

A. As I recall, it seems to me those were around 120 pounds, but I am not sure. That particular car may have had all drums in it, but I don't know.

2777 Q. Drums?

A. Yes, paper drums.

2778 Q. When was that car unloaded after it came in?

A. Well, all I can say about that is, it was unloaded on the 17th of March. We know it was empty then, but I don't know if it was emptied the day before, or that day, or just when it was unloaded.

Mr. Tautges: That is all.

Witness excused.

(signed) Ewold T. Leonardson.

[fol. 355] 2779 Mr. R. B. Hamer: The Defendant offers in evidence what has been marked as Exhibit number 14, be-

ing a certified copy of the monthly meteorological summary of the United States Department of Commerce weather bureau at Seattle, Washington, for the first fifteen days of March, 1943, as the same appear on the monthly summary.

Mr. Tautges: No objection.

Defendant's Exhibit Number 14 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

Mr. R. B. Hamer: I think we might be able to save time, Your Honor, if I would at this time just read the parts to the Jury that I am particularly interested in at this time. This monthly meteorological summary is made up in columns, as you will notice, and of course you can examine this at any time at your leisure, but I want to call these matters to your attention. On March 1, 1943, there was no precipitation; on March 2, 1943, there was no precipitation; on March 3, 1943, there was no precipitation; on March 4, 1943, there was no precipitation; on March 5, 1943, there was no precipitation; on March 6, 1943, there was no precipitation. on March 7, 1943, there was no precipitation; on March 8, there is a "T" for trace; on March 9th, none; on March 10th, none; on March 11th, none; on March 12th, .06 of an inch; on March 13th, .06 of an inch; on March 14th, a trace; on March 15th, a trace.

The sun set on March 15th, 1943, at 6:14, Pacific Standard time, which would be 7:14 Pacific War Time.

(Here follow 3 photolithographs, side folios 356, 356a, 356b)

Defendant's Exhibit No. 14

D #14
pff

UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF COMMERCE
WEATHER BUREAU

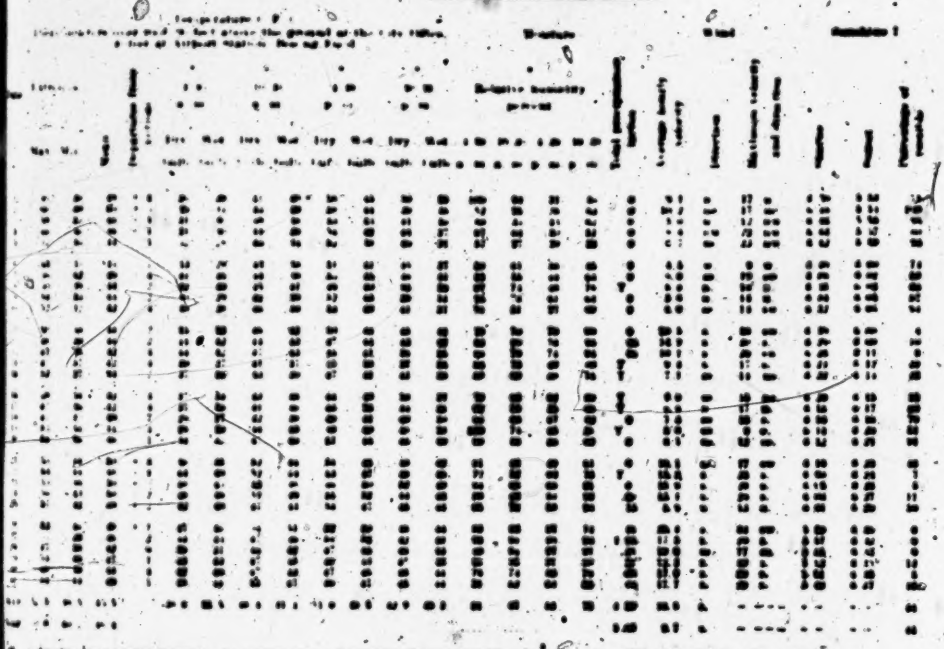
Station Seattle, Washington Date May 1, 1944.

As the custodian of the records of the U. S. Weather Bureau filed at Seattle, Washington, I hereby certify that it appears from such records that the data as shown on the attached form (1030 Retl.) is correct having been checked with the original records.

U. S. DEPARTMENT OF COMMERCE
WEATHER BUREAU

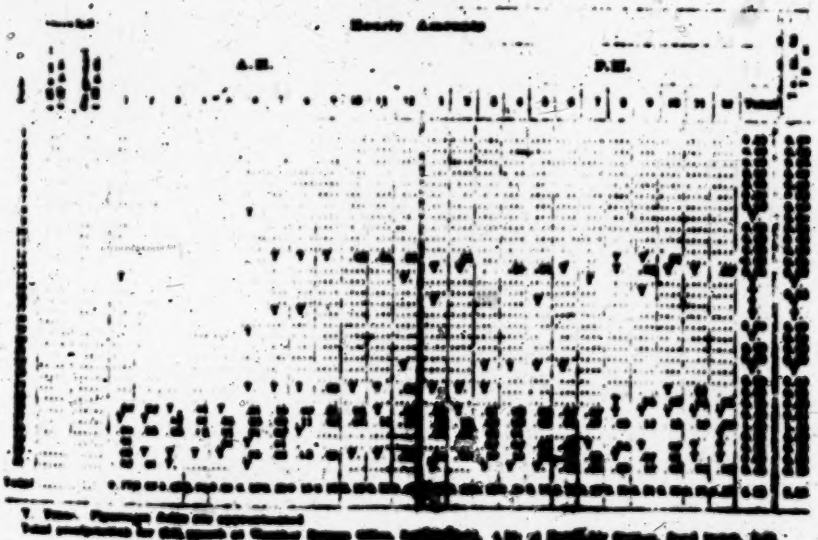
MONTHLY METEOROLOGICAL SUMMARY

SEATTLE, WASH. 120th meridian time PACIFIC STANDARD TIME MARCH 1918



PRECIPITATION

Hourly Amounts



Defendant's Exhibit No. 14

Summary for the Month of March 1943

PRESSURE

Mean, 29.69 inches.
Highest, 30.35 inches; date, 9
Lowest, 29.04 inches; date, 29

TEMPERATURE

Highest, 68°, date, 2
Lowest, 22°, date, 10
Greatest daily range, 23°; date, 2
Least daily range, 8°; date, 26
Accumulated deficiency since January 1, 97
Average daily deficiency since January 1, 1.1°
Total degree days this month, 992

PRECIPITATION (Inches)

Greatest this month in 5 minutes, .01, date, 27; 10 minutes, .05, date, 27; 20 minutes, .12, date, 27; 30 minutes, .12, date, 27; 1 hour, .17, date, 27; 2 hours, .31 date, 27; 24 hours, 2.10, date, 27-28
Excess this month as compared with the normal, 1.31
Deficiency since January 1, 2.32

WEATHER

(Number of days)

Clear (scale 0 to 3), 7
Partly cloudy (scale 4 to 7), 6
Cloudy (scale 8 to 10), 18
With 0.01 inch or more precipitation, 10
With 0.25 inch or more precipitation, 5
Total sunshine, hours, 163.0

WIND

Total movement (miles), 7,859
Average hourly velocity (miles), 10.6
Prevailing direction, south.

MISCELLANEOUS PHENOMENA

(Dates of)

Hail, —, Sleet, —.
Heavy fog, —.
Thunderstorms, —.
Frost,- Light, —
Heavy, — Killing, 9, 10, 18.

COMPARATIVE DATA FOR THIS MONTH FROM THE RECORDS, 1890-1943

MONTHLY TEMPERATURES

MONTHLY PRECIPITATION

Note: The chief precipitation record at each hour is [illegible] with records of other months. Weather Bureau stations and that [illegible] [illegible] [illegible]

[fol. 357] MR. KEITH MURPHY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. R. B. Hamer:

2780 Q. Will you state your name and address?

A. Keith Murphy, 10013 Thirty-fourth Avenue Southwest, Seattle, Washington.

2781 Q. By whom are you employed, Mr. Murphy?

A. The Union Pacific Railroad.

2782 Q. How long have you been employed by that company?

A. Since March 29, 1941.

2783 Q. What is your employment at this time?

A. I am an engine foreman.

2784 Q. In the Argo yards?

A. Yes, sir.

2785 Q. How long have you been employed as an engine foreman?

A. Since January of 1942, the 21st of the month.

2786 Q. Do you know the plaintiff in this case, Mr. Ellis, who is sitting here?

A. Yes, sir.

2787 Q. Did he formerly work with you?

A. Yes, sir.

2788 Q. And was he at one time, or during one period of time at least, under your supervision when you were engine foreman?

A. Yes.

2789 Q. Do you recall about how long a time Mr. Ellis was with you as helper in your crew?

A. As I remember, it was at least three months, or longer than that possibly.

[fol. 358] 2790 Q. Where, generally, were you working during that time?

A. While Mr. Ellis was working with me?

2791 Q. Yes.

A. On East Marginal Way.

2792 Q. And in the area of the industrial district, where the Continental Can Company and the Casein Company were located?

A. Yes, sir.

2793 Q. As a part of your work as engine foreman since you have been with the railroad, have you made and kept any records, more particularly industrial records?

A. We are required to keep an industrial record of all cars we spot into an industry or take from an industry.

2794 Q. Showing you, Mr. Murphy, what the reporter has marked as Exhibit number 15, will you state whether or not that is a record made by you?

A. Yes, I made this record.

2795 Q. And when did you make that record?

A. The date was August 15, 1942, the seventh month, 1942,—I believe that is July.

2796 Q. Is your name shown on that record as foreman?

A. Yes, sir.

2797 Q. Who were your helpers on that day?

A. Baker and Ellis.

2798 Q. Is that the same Ellis you identified here a moment ago as being one of the helpers who worked with you?

A. Yes.

2799 Q. Can you, from an examination of that record Mr. Murphy, state whether or not you had a car on that day to pick up or deliver to the Casein Company?

[fol. 359] A. Yes.

2800 Q. Who made this entry which appears as respects the car which moved into the Casein Company?

A. Will you state that again?

2801 Q. Who made the entry on the record with respect to the car which moved into the Casein Company?

A. I made the record.

2802 Q. Now is the record as you see it here, Mr. Murphy, in the same condition as it was at the time you had completed making it on the 15th of July, 1942? If not, what changes are there in it?

A. Well, somebody has marked in ink here. That is not my writing.

2803 Q. Except for the writing that appears upon it in ink, and except for the reporter's identification number, is all the rest of it in your handwriting?

A. Yes, I would say it is.

2804 Q. How do you make that record? Will you tell the Jury the manner in which there records are made, or the manner in which this record was made by you?

A. Well, this is the form that is given to us by the Company and we are required to list the letters or initials of the car; the number of the car, and the kind of car, whether it is a box car or a gondola; where we get the car, that is, where we pick the car up, and where it is delivered, and the time that we pick the car up.

2805 Q. What do you do with the record after you make it?

A. I turn it in to the office. There is a box that is provided for that.

[fol. 360] 2806 Q. And have you made any examination of this book here to determine whether or not it consists of records of the kind that Exhibit number 15 is, made by you and also by other persons?

A. Will you state that again, please?

2807 Q. (Question read by reporter).

A. Yes, I have.

2808 Mr. Hamer: Defendant offers in evidence Defendant's Exhibit number 15, being this one sheet, and asks leave to substitute a copy, which has been by the reporter also marked as Exhibit number 15, for the purpose of the record.

Mr. Tautges: No objection.

Defendant's Exhibit number 15 having been offered in evidence and received without objection, same is attached to and made part of this Bill of Exceptions.

Defendant's Exhibit No. 15

Station _____ Date 7-15 19 42

Engine No. 1719 Foreman _____

Helpers _____

CAR Initial	CAR Number	Empty	Ld or Mty	TAKEN From	TAKEN To	Time Set

[fol. 362] 2809 Q. Now Mr. Murphy, it is easier for you to see the original. Will you state what the time of day was that you went in to deliver the car on the Casein track?

A. My record shows it was 5:10 P.M.

2810 Q. And was Mr. Ellis there at the Casein Company with you on that occasion?

A. He was a member of the crew. He must have been.

2811 Q. In what position did Mr. Ellis work during the time he was a member of your crew?

A. As I remember it, he normally worked in what we call the field.

2812 Q. Did he also work some as the head man or pin-puller?

A. Well, it is reasonable to believe that he did.

2813 Q. Your recollection is,—in which position did he work most of the time that he worked with you?

A. Most of the time I would say he worked the field.

2814 Q. I am now handing you what has been marked by the reporter as Exhibit number 16. Let me ask you if that is a record made by you, of the same kind and for the same purpose as Exhibit number 15 was made, that has been mentioned here?

A. Yes, that is right.

2815 Q. And when did you make that record?

A. 7-27-42.

2816 Q. Who were your helpers on that occasion?

A. Ellis and Jones.

2817 Q. Now is everything that is on the face of Exhibit number 16, except the red pencil marks and the lines that are in ink, in your own handwriting?

A. Yes, except the reporter's mark.

[fol. 363] 2818 Q. The reporter's identification n[illegible]rk?

A. That is right.

2819 Q. And is it in the same condition as when you turned it in to the yard office?

A. As near as I can determine, it is.

2820 Q. Directing your attention to Exhibit number 16, is there a record there of the crew of which you were the foreman handling a car into or from the Casein Company?

A. Yes.

2821 Q. On that date?

A. Yes.

2822 Q. And what was the time of day?

A. It was 5:10 that day.

2823 Mr. Hamer: Defendant offers in evidence Defendant's Exhibit number 16, and asks leave to substitute a photostatic copy for the purpose of the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 16 having been offered in evidence and received with out objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 364)

Defendant's Exhibit No. 16

Form 2653

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR		Kind	Ld or Mty	TAKEN		Time Set
Initial	Number			From	To	

364

[fol. 365] 2824 Q. Handing you what has been marked as Exhibit number 17, let me ask you to state if that is another one of the industrial records that you made?

A. Yes.

2825 Q. And when was that record made?

A. 7-29-42.

2826 Q. And who were your helpers on that day?

A. Jones and Ellis.

2827 Q. And does that record show the movement of a car into or from the Casein Spur track by your crew, or the crew of which you were foreman on that day?

A. Yes.

2828 Q. And what time is shown?

A. 4:35 P.M.

2829 Q. And is that record all in your own handwriting with the exception of what appears in red pencil or appears in ink?

A. Yes.

2830 Q. And was it in the same condition at the time you turned it in to the yard office?

A. Yes, sir.

2831 Mr. Hamer: Defendant offers in evidence Exhibit number 17 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 17 having been offered in evidence and received without objection, same is attached to — made a part of this Bill of Exceptions.

Defendant's Exhibit No. 17

Station _____ Date _____ 19___

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set

[fol. 367] 2832 Q. Handing you, Mr. Murphy, what the reporter has marked as Exhibit Number 18, I will ask you if that is a record made by you?

A. Yes.

2833 Q. And on what date?

A. 7-31-42.

2834 Q. Who were your helpers on that date?

A. Olsen and Ellis.

2835 Q. Does this record made by you show the movement of a car either to or from the Casein Spur?

A. Yes.

2836 Q. And what was the time of the day?

A. 4:25 P.M.

2837 Q. Is Exhibit number 18, except for what has been written on it in ink, entirely in your handwriting and in the same condition that it was at the time you turned it in to the yard office?

A. Yes.

2838 Mr. Hamer: Defendant offers in evidence its Exhibit number 18 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: There is no objection.

Defendant's Exhibit Number 18 having been offered in evidence and received by the Court without objection, same is attached to and made a part of this Bill of Exceptions.

Defendant's Exhibit No. 18

Station _____ Date _____ 19 ___

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Load or Empty	Ld or Mty	TAKEN From	TAKEN To	Time Set
UP X	63148	L	L	Omaha	[illegible]	[illegible]
[illegible]	154141	L	L	[illegible]	Omaha	[illegible]
[illegible]	[illegible]	[illegible]	X	—	[illegible]	—
[illegible]	[illegible]78	L	L	[illegible]	Omaha	[illegible]
[illegible]	[illegible]04	L	X	[illegible]	[illegible]	[illegible]
NYC	301196	L	L	BN	[illegible]	[illegible]
UP	56[illegible]	E	—	BN	—	—
L&N	96[illegible]1	L	X	Cassin	Omaha	[illegible]
[illegible]	87431	L	L	—	[illegible]BN	—
RI	141436	L	—	Tyler	Omaha	[illegible]
CNW	96322	L	—	[illegible]	[illegible]	—
[illegible]	92329	L	—	—	[illegible]	—
NP	60619	E	—	—	NP	—
LV	52070	L	L	[illegible]	[illegible]	[illegible]
D&RGW	42424	L	—	—	[illegible]	—
NC	30893	L	L	KC [illegible]	[illegible]	[illegible]
[illegible]	1361.4	L	—	[illegible]	[illegible]	[illegible]
UP	[illegible]	E	X	—	Omaha	—

[fol. 309] 2839 Q. Mr. Murphy, handing you what has been marked now as Exhibit number 19, let me ask you if that is a record you made, of the same kind as the other exhibits that we have mentioned here in your testimony?

A. It is.

2840 Q. And when was that record made by you?

A. 7-30-42.

2841 Q. And who were your helpers on that date?

A. Ellis and Jones.

2842 Q. Did you make an entry with respect to the movement of a car into or from the Casein Spur track?

A. Yes.

2843 Q. And what time of the day was that car moved?

A. 4:20 P. M.

2844 Q. And is this record, except for what appears upon it in ink and the red pencil marks, and the reporter's identification number, the same as when you made it out and turned it in to the yard office?

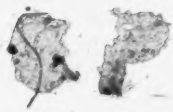
A. Yes.

2845 Mr. Hamer: Defendant offer in evidence its Exhibit number 19, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: There is no objection.

Defendant's Exhibit Number 19 having been offered in evidence by the Defendant, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 370)



Defendant's Exhibit No. 19

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR		Train	Ld or Mty	TAKEN		Time Set
Initial	Number			From	To	

[fol. 371] 2846 Q. Handing you what has now been marked as Exhibit number 20, let me ask you if that is a record of the same kind, made by you?

A. Yes.

2847 Q. And when was that record made?

A. 8-11-42.

2848 Q. And who were your helpers on that date?

A. Ellis and Olsen.

2849 Q. Does that record show that the crew that was under your supervision handled the movement of a car into or from the Casein Spur track?

A. Yes.

2850 Q. At what time of the day?

A. It says 3:50 P.M.

2851 Q. And is Exhibit number 20, except for what has subsequently been written on it in ink, and some red check marks, in the same condition as it was at the time you made it and turned it in to the yard office?

A. Yes, sir.

2852 Mr. Hamer: Defendant offers in evidence Exhibit number 20, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 20 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 372)

Defendant's Exhibit No. 20

Form 2653

Station _____ Date _____ 19__

Engine No. 1013 Foreman _____

Helpers _____

CAR Initial	CAR Number	Load	Ld or Mty	TAKEN From	TAKEN To	Time Set
AT SF	7147	L	X			
UP	161251	—	—			
N C	[illegible]	L	L			
UP	[illegible]	—	—			
UP	30177	—	—			
NC	97630	—	X			
SC	94003	L	[illegible]			
NP	52563	—	—			
BN	36152	M	X			
BN	32241	—	—			
UP	191457	—	[illegible]			
Miles	65623	F	—			
NP	10[illegible]	[illegible]	[illegible]			
L&N	5406	B	X			
MP	31157	[illegible]	[illegible]			
C NW	68526	P	[illegible]			
L&N	34163	[illegible]	[illegible]			
C BXQ	[illegible]	—	X			

[fol. 373] 2853 Q. Handing you what has been marked by the reporter as Exhibit number 21, I will ask you to state if that is a record made by you?

A. Yes.

2854 Q. On what date was that record made?

A. 8-10-42.

2855 Q. Who were your helpers on that day?

A. Olsen and Ellis.

2856 Q. Does that record show a movement made by a crew under your supervision in or from the Casein Spur track?

A. Yes.

2857 Q. And at what time of day?

A. 5:00 P. M.

2858 Mr. Hamer: Defendant offers in evidence its Exhibit number 21, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: There is no objection.

Defendant's Exhibit Number 21 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

Defendant's Exhibit No. 21

Form 2883

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR				TAKEN		Time Set
Initial	Number	Kind	Loaded or Empty	From	To	

[fol. 375] 2859 Q. Handing you, Mr. Murphy, what has been marked as Exhibit number 22, let me ask you to state if that is a record in your handwriting?

A. Yes.

2860 Q. And when was that made by you?

A. 8-20-42.

2861 Q. Who were your helpers on that day?

A. Ellis and Groves.

2862 Q. Did you make a record on that day of a movement handled by your crew into or from the Casein Spur track?

A. Yes.

2863 Q. What was the time that movement was made?

A. 4:10 P.M.

2864 Q. Is Exhibit number 22, except for what appears on it in ink and some red check marks, in the same condition it was at the time you made it and turned it in to the yard office?

A. Yes.

2865 Mr. Hamer: Defendant offers in evidence Exhibit number 22 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 22 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 376)

Defendant's Exhibit No. 22

Station _____ Date _____ 19___

Engine No. _____ Foreman _____

Helpers _____

CAR				TAKEN		
Initial	Number	Size	Ld or Mty	From	To	Time Set

376

[fol. 377] 2866 Q. Handing you what has been marked as Exhibit number 23, I will ask you to state if that is a record made by you?

A. Yes.

2867 Q. And when did you make that record?

A. 8-22,—1942 I imagine.

2868 Q. Who were your helpers on that day?

A. Mead and Ellis.

2869 Q. Did you make a record on that day of the movement of a car into or from the Casein Spur track?

A. Yes.

2870 Q. What time of the day was that movement made?

A. 4:20 P.M.

2871 Q. Is Exhibit number 23, except for what appears upon it in ink, and a couple of red check marks, in the same condition as it was when you made it and turned it in to the yard office?

A. Yes.

2872 Mr. Hamer: Defendant offers in evidence its Exhibit number 23, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 23 having been offered in evidence by the Defendant, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 378)

Defendant's Exhibit No. 23

Form 2883

Station [illegible] Date 8-22 19

Engine No. 1013 Foreman [illegible]

Helpers [illegible]

CAR Initial	CAR Number	Type	Ld or Mty	TAKEN From	TAKEN To	Time Set
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[fol. 379] 2873 Q. Handing you what has been marked as Exhibit number 24, I will ask you to state if that is a record made by you, appearing in your own handwriting?

A. Yes.

2874 Q. When was that record made?

A. 8-27-42.

2875 Q. Who were your helpers on that day?

A. Ellis and Groves.

2876 Q. And does that record contain an entry showing the movement of a car into or from the Casein Spur track?

A. Yes.

2877 Q. At what time of the day?

A. 5:00 P.M.

2878 Q. Is that record in the same condition as it was at the time you made it and turned it in to the yard office, except what has been subsequently written on it in ink and some red check marks?

A. Yes.

2879 Mr. Hamer: Defendant offers in evidence its Exhibit Number 24 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 24 having been offered in evidence by the Defendant, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 380)

Defendant's Exhibit No. 24

Station Angel Date 8-27 19[illegible]

Engine No. 4982 Foreman [illegible]

Helpers [illegible]

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set
UP	307831	B	X	Conlee	[illegible]	4P
—	191651	—	—	—	—	
KCS	17654	—	—	—	[illegible]	
SP	64977	B	X	Oland	Bar	4P
—	67792	—	—	Oland	—	—
—	96623	—	—	Oland	—	—
MoPac	42107	—	—	Oland	—	—
SP	95352	B	—	[illegible]	[illegible]	4P
GW	66646	B	—	—	Oland	—
NYC	114256	—	—	Conlee	[illegible]	5P
NKP	15465	—	—	—	[illegible]	—
Lou	146543	—	—	Oland	Bar	7P
GRI	81996	—	—	Oland	[illegible]	
AN	9188	B	X	Bair	[illegible]	8P
—	405066	B	X	Kelton	[illegible]	9P
CO	91002	F	—	—	[illegible]	—
KTMO	70444	—	—	—	[illegible]	—
NP	52405	B	—	—	[illegible]	—

[fol. 381] 2880 Q. Showing you what has been marked as Exhibit number 25, let me ask you if that is a record made by you, and in your handwriting?

A. Yes.

2881 Q. On what date was that record made?

A. 9-1-42.

2882 Q. Who were your helpers on that day?

A. Groves and Ellis.

2883 Q. And did you make the entry which appears on Exhibit 25 with respect to a movement handled by the crew of which you were foreman, into or from the Casein Spur?

A. Yes.

2884 Q. What time of the day was that movement made?

A. 4:25 P. M.

2885 Q. Is Exhibit number 25 in the same condition as when you made it and turned it in to the yard office, with the exception of what was subsequently written in ink and the three red check marks?

A. Yes.

2886 Mr. Hamer: Defendant offers in evidence Exhibit number 25, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 25 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

Defendant's Exhibit No. 25

Form 2853

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN FROM From	TAKEN FROM To	Time Set
[illegible]	5118[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	522[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	5[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NI	14194	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
UP	193302	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
N[illegible]	1	B	X	[illegible]	[illegible]	[illegible]
NO	2	F	X	[illegible]	[illegible]	[illegible]
CNW	179141	[illegible]	X	[illegible]	[illegible]	[illegible]
L[illegible]	6[illegible]105	G	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]6241	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	67201	F	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	25[illegible]67	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	2[illegible]756	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
BN	530[illegible]	B	X	[illegible]	[illegible]	[illegible]
NP	174[illegible]2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	72000	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	68549	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
CBQ	21375	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[fol. 383] 2887 Q. Handing you, Mr. Murphy, what has been identified as Exhibit number 26, I will ask you if that is a record made by you and appearing in your handwriting?

A. Yes.

2888 Q. When was that record made?

A. 9-3-42.

2889 Q. And with respect to movements being handled on what date? On the same date?

A. Oh, yes, we made the movements on the same date.

2890 Q. Who were your helpers on that day?

A. Ellis and Groves.

2891 Q. And does there appear an entry in your own handwriting with respect to the movement of a car on the Casein Spur?

A. Yes.

2892 Q. What time of the day was that movement made?

A. 5:10 P.M.

2893 Q. And is Exhibit number 26 in the same condition except for the writing that appears upon it in ink, as it was at the time you turned it in to the yard office?

A. Yes.

2894 Mr. Hamer: Defendants offer in evidence Exhibit number 26 and ask leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 26 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 384)

Defendant's Exhibit No. 26

Form 2888

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Type	Ld or Mty	TAKEN From	TAKEN To	Time Set
UP	164535	C	L			
Q	30742	B	-	-		-
UP	150477	B	-			-
SL-SF	150317	B	-	-		-
UP	158321	B				
NP	47223	B	X	-	NP	-
UP	35	-	-	-		-
CB	343411	T	-	NP		
	6T0922	B	X			
Wabash	55076					
UP	193003	-	-	-		
GN-SP	305726	B	X			
Milw	17113	B	X			
UP	51167	F	X			
Q	118409	B	X			
Wabash	17047	B	X			-
Lou	37317		X			-
CA	5677		-	-		-

[fol. 385] 2895 Q. Handing you, Mr. Murphy, what has been marked Exhibit number 27, is that another one of these records in your own handwriting?

A. Yes.

2896 Q. When was that record made?

A. 9-9-42.

2897 Q. Was that made with respect to movements that were being handled on September 9, 1942?

A. Yes.

2898 Q. Is there an entry there with respect to the movement of a car into or from the Casein Spur?

A. Yes.

2899 Q. Is that also in your handwriting?

A. Yes, sir.

2900 Q. Who were your helpers on that day?

A. Ellis and Groves.

2901 Q. When was the car handled from the Casein Spur track?

A. 4:20 P. M.

2902 Q. Is Exhibit number 27 in the same condition, with the exception of what has been written on it in ink and some red pencil check marks as it was at the time you turned it in?

A. Yes.

2903 Mr. Hamer: Defendant offers in evidence Exhibit number 27, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 27 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 386)

Defendant's Exhibit No. 27

Form 2883

Station _____ Date _____ 19__

Engine No. 4 Foreman _____

Helpers C _____

CAR		Load or Empty	Li or Bty	TAKEN		Time Set
Initial	Number			From	To	
Wabash	56186	X	/	Mylan	Depot	3 PM
	201111	-	-	Dela	—	—
[illegible]	56485	X	/	Dela	[illegible]	3 [illegible]
[illegible]	185432	-	X	Otw	—	
ATW	36[illegible]	-	—	Dela	[illegible]	2 [illegible]
Pa	20157	X	X	[illegible]	[illegible]	3 [illegible]
CNP	53521	X	X	[illegible]	[illegible]	3 [illegible]
Pa	559086	X	X	Otw	[illegible]	3 [illegible]
IC	37486	-	-	[illegible]	—	—
Wabash	60754	X	-	Black	[illegible]	3 [illegible]
NP	55503	-	X	—	[illegible]	—
—	59164	-	-	—	—	—
UCR	20053	-	X	—	[illegible]	—
—	21291	-	-	—	[illegible]	—
ATW	57293	R	X	[illegible]	[illegible]	4 [illegible]
Pa	98626	-	X	[illegible]	[illegible]	4 [illegible]
BRC	91076	-	X	—	[illegible]	—
NP	253993	X	-	[illegible]	[illegible]	4 [illegible]

[fol. 387] 2904 Q. Handing you Exhibit number 28, is that another one of these records made by you in your hand writing, Mr. Murphy?

A. Yes.

2905 Q. When was that record made?

A. 9-10-42.

2906 Q. And with respect to movements that were made on September 10, 1942?

A. Yes.

2907 Q. Who were your helpers on that day?

A. Groves and Ellis.

2908 Q. Is there an entry upon that record which shows that a box carload was taken from the Casein Company's Spur track at 5:40 P. M.?

A. Yes.

2909 Q. Is this record also in the same condition as it was when you made it out and turned it in to the yard office, excluding what has been written on it in ink and some red pencil check marks?

A. Yes.

2910 Mr. Hamer: Defendants offer in evidence Exhibit number 28, and ask leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 28 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 388)

Defendant's Exhibit No. 28

Form 2853

Station _____ Date _____ 19 4_

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set
	37792	-				
-	31180	-	-			
-	84308	-	-			
VP	190256	-	-			
B&O	384082	-	-			
UP	192913	-	-			
-	190224	-	-			
Q	32264	-	-			
Wabash	309247	B	-			
-	307872	-	-			
CB&Q	464380	-	Y			
UP	176250	-	-			
SP	95026	-	-			
CNW	75257	-	-			
GN	36772	-	-			
MW	370368	B	W			
Ca	344109	-	-			

[fol. 389] 2911 Q. Handing you, Mr. Murphy, what has been marked as Exhibit number 29, I will ask you if that is one of these records, made out in your own handwriting?

A. Yes.

2912 Q. And when was that record made?

A. 9-18-42.

2913 Q. And was that with respect to movements that were made on that day?

A. Yes.

2914 Q. Whoe were your helpers on that occasion?

A. Ellis and Groves.

2915 Q. And does there appear on Exhibit number 29 an entry showing that a car was moved into or from the Casein Spur track?

A. Yes.

2916 Q. What was the initial and number of that car?

A. That was a Soo-Line, number 76058, box car.

2917 Q. I notice on this record, Exhibit number 29, what appears to be the word "Casten" instead of "Casein". Can you explain that?

A. Yes, I have the word "Argo" written above that the *the* "g" is extended down to coincide with the "i" in Casein, and I think what appears to be a cross on the "t" is what I intended to be the dot for the "i".

2918 Q. Is Exhibit number 29 in the same condition as when you made it and turned it in, except for what appears in ink and some red pencil check marks?

A. Yes, sir.

2919 Mr. Hamer: Defendant offers in evidence Exhibit number 29, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 29 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 390.)

Defendant's Exhibit No. 29

Station _____ Date _____ 19 ..

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Load	Ld or Mty	TAKEN From	TAKEN To	Time Set
UP	474038	B	L			
Meiers	6136	—	—			
SP	83686	—	—			
[illegible]	41205	—	—			
[illegible]	41499	—	—			
Miller	711154	—	—			
DN	130888	B	X	Meier		
—	4994	—	X			
[illegible]	5-1054	F	X			
Miller	361208	B	L			
[illegible]	175536	B	L			
[illegible]	26058	B	—			
[illegible]	92600	—	—			
NYC	199550	—	—			
CB	41015	F	X	—		
UP	56188	—	L			
LV	26660	B	X			
NYC	880742	B	L			

[fol. 391] 2920 Q. Handing you what has been marked by the reporter as Exhibit number 30, is that another one of these records made by you, in your own handwriting?

A. Yes.

2921 Q. And on what date?

A. 9-26-42.

2922 Q. And who were your helpers on that date?

A. Fossem and Ellis.

2923 Q. And is there an entry on that record, in your handwriting, with respect to a car being handled on the Casein Spur track?

A. Yes.

2924 Q. What time was that movement handled on the 26th of September, 1942?

A. 5:00 P. M.

2925 Q. And except for what appears on here in ink, and some red check marks, is this record, Exhibit number 30, in the same condition it was in at the time you made it and turned it in to the yard office?

A. Yes.

2926 Mr. Hamer: Defendant offers in evidence Exhibit number 30, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 30 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 392)

Defendant's Exhibit No. 30

Station _____ Date _____ 19

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Empty	Ld or Mty	TAKEN From	TAKEN To	Time Set
NP	13831	X	X	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]			NP		
[illegible]	40[illegible]	-	-	NP		
[illegible]	[illegible]			[illegible]		
[illegible]	[illegible]	-	-	[illegible]		
[illegible]	[illegible]	-	-	[illegible]		
[illegible]	[illegible]	-	-	NP		
[illegible]	[illegible]	-	-	NP		
LVN	53064	-	X	[illegible]	[illegible]	
[illegible]	50965		X	-	NP	
[illegible]	277655	-	X	-	NP	
CNW	22356	-	X	-	NP	
LVN	55563	-	X	-	[illegible]	
[illegible]	4731	-	-	-	NP	
[illegible]	716200	-	-		[illegible]	
[illegible]	122816			-	[illegible]	
[illegible]	[illegible]	-	X	-	[illegible]	
WP	2734	-	X	[illegible]	[illegible]	
SP	33749	-	-	-	[illegible]	

[fol. 393] 2927 Q. Handing you what has been marked as Exhibit number 31, is that one of these industrial records that you made, appearing in your own handwriting?

A. Yes.

2928 Q. When was that record made?

A. 9-27-42.

2929 Q. With respect to movements that were handled that day?

A. Yes.

2930 Q. Who were your helpers on that day?

A. Ellis and Olsen.

2931 Q. And does that record show a movement into or from the Casein Spur track?

A. Yes.

2932 Q. What is the case,—was it taken from there or put it in there?

A. That was a car that was put into Casein.

2933 Q. What time was that car set in on the Casein Spur track?

A. 6:20 P. M.

2934 Q. Is Exhibit number 31 in the same condition as it was at the time you made it out and turned it into the yard office, with the exception of the writing that appears on it in ink and a couple of red check marks?

A. Yes, sir.

2935 Mr. Hamer: Defendant offers in evidence Exhibit number 31 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 31 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 394)

Defendant's Exhibit No. 31

Station _____ Date _____

Engine No. _____ Foreman _____

Helpers _____

CAR				TAKEN		Time Set
Initial	Number			From	To	
UP	16[illegible]1	R				
UP	16[illegible]					
—	16[illegible]					
[illegible]	27[illegible]					
RI	14[illegible]					
IC	1[illegible]					
[illegible]	[illegible]					
[illegible]	[illegible]					
[illegible]	[illegible]					
UP	1[illegible]					
AE Y	3[illegible]					
SN	43302					
[illegible]	27[illegible]					
CBQ	73[illegible]					
[illegible]	[illegible]					
MP	85[illegible]					
MP	34[illegible]					
SN	9[illegible]					

[fol. 395] 2936 Q. Handing you what has been marked as Exhibit number 32, will you state if that is another one of these records made by you and in your handwriting?

A. Yes.

2937 Q. When was that record made?

A. 9-28-42.

2938 Q. Who were your helpers on that day?

A. Eliis and Olsen.

2939 Q. Was that record made with respect to movements that were made on that day?

A. Yes.

2940 Q. Is there an entry on that record which shows the movement of a car taken from the Casein Company spur?

A. Yes.

2941 Q. At what time?

A. 4:05 P. M.

2942 Q. Is Exhibit number 32 in the same condition that it was in at the time you made it and turned it in to the yard office, with the exception of check marks and the writing appearing on it in ink?

A. Yes.

2943 Mr. Hamer: Defendant offers in evidence Exhibit number 32, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 32 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 396)

Defendant's Exhibit No. 32

Station _____ Date _____

Engine No. 1013 Foreman _____

Helpers _____

CAR Initial	CAR Number	Sec X	Ld or Mty	TAKEN From	TAKEN To	Time Set
[illegible]	16071	B	L	[illegible]	[illegible]	[illegible]
RI	142150	-		WP	—	
—	44773			NP	—	-
IC	33892	-		NP	—	—
UP	150264	—	L	[illegible]	[illegible]	[illegible]
—	192636	—	L	—	[illegible]	
—	161405	—	X	—	[illegible]	—
IC	15684	B	L	[illegible]	[illegible]	[illegible]
NYC	199408	B	-	[illegible]	[illegible]	[illegible]
UP	192124	B	L	[illegible]	[illegible]	[illegible]
[illegible]	650027	F	L	[illegible]	[illegible]	—
NYC	616455	B	L	[illegible]	[illegible]	—
BM	73013	B	L	QM	[illegible]	[illegible]
NC	26976	-	L	—	[illegible]	
PFE	16760	-	X	—	[illegible]	—
[illegible]	30548	-	L	—	[illegible]	—
CNW	72164	-	X	—	[illegible]	—
CNW	140605	-	L	—	[illegible]	—

396

[fol. 397] 2944 Q. Handing you Exhibit number 33, Mr. Murphy, state if that is one of these records made by you, and in your handwriting?

A. Yes.

2945 Q. When was that record made?

A. 9-29-42.

2946 Q. Who were your helpers on that day?

A. Olsen and Ellis.

2947 Q. Is there upon that record an entry showing the movement of a car from the Casein Company plant on the Casein Spur track?

A. Yes.

2948 Q. At what time of the day?

A. 4:20 P. M.

2949 Q. Is Exhibit number 33 in the same condition as when you made it out and turned it in to the yard office, with the exception of what is written on it in ink and some red pencil marks?

A. Yes.

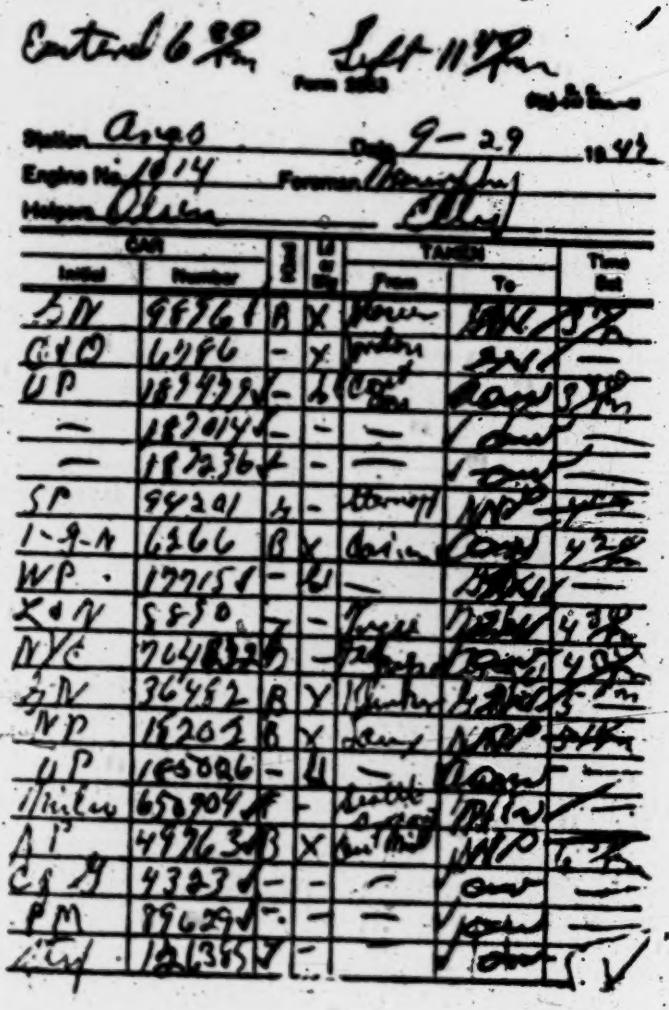
2950 Mr. Hamer: Defendant offers in evidence Exhibit number 33 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 33 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 398)

Defendant's Exhibit No. 33



Entered 6 PM Left 11 PM

Station Argo Date 9-29 1942

Engine No. 1614 Foreman

Helper

CAR Initial	CAR Number	Load	Ld or Mty	TAKEN From	TAKEN To	Time Set
SN	98761	B	X			
C&O	6986	-	X			
UP	183479	-	L			
—	182014	-	-	—		—
—	182364	-	-	—		—
SP	94201	L	-			
I-G-N	6266	B	X			
WP	177151	-	L	—		—
X of N	5850	-	-			
NYC	764832	-	-			
GN	36462	B	X			
NP	16205	B	X			
UP	185026	-	L	—		—
Illinois	65904	-	-			
AT	49763	X				
CG W	4323	-	-	—		—
PM	89629	-	-	—		—
Erie	12135	-	-			

[fol. 399] 2951 Q. Handing you what has been marked as Exhibit number 34, Mr. Murphy, let me ask you if that is one of these industrial switching records made by you?

A. Yes.

2952 Q. When was that record made?

A. 10-2-42.

2953 Q. Who were your helpers on that day?

A. Ellis and Madison.

2954 Q. Does that record show an entry with respect to a movement of a car taken from the Casein Spur?

A. Yes.

2955 Q. At what time was that movement handled?

A. 9:50 P. M.

2956 Q. Is Exhibit number 34 in the same condition as it was when you made it out and turned it in to the yard office, with the exception of what appears on it in ink and some red pencil check marks?

A. Yes.

2957 Mr. Hamer: Defendant offers in evidence Exhibit number 34 and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 34 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 400)

Defendant's Exhibit No. 34

Form 2651

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR		Sex	Ld or Mty	TAKEN		Time Set
Initial	Number			From	To	
	28623					
	15215					
	26053					
IC	37395					
DW	26674					

[fol. 401] 2958 Q. Handing you what has been identified as Exhibit number 35, I will ask you to state if that is another one of these industrial switch records made by you, Mr. Murphy?

A. Yes.

2959 Q. When did you make that record?

A. 10-7-42.

2960 Q. Who were your helpers on that date?

A. Chown and Ellis.

2961 Q. And does this record contain an entry with respect to the movement of a car from the Casein Spur?

A. Yes.

2962 Q. At what time of the day?

A. 3:50 P. M.

2963 Q. Is Exhibit number 35 in the same condition as it was at the time you made it out and turned it in to the yard office with the exception of what has been subsequently written on it in ink and the read pencil marks?

A. Yes.

2964 Q. By the way, Mr. Murphy, do you know what this writing in ink is, and these red pencil marks?

A. Not definitely, but I imagine it is the work done by the clerks in the office in checking over the records.

2965 Mr. Hamer: Defendant offers in evidence Exhibit number 35, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 35 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 402)

Defendant's Exhibit No. 35

Station .. Date .. / .. 19

Engine No. Foreman

Helpers

CAR Initial	CAR Number	Sex	Ld or Mty	TAKEN From	TAKEN To	Time Set
	94302	B				
	12412					
		F				
	216654	B				
NP	118705	F				
	118781					
	71268	B				
SP	26849					
	30454					
	361232					
	19463					
	190543					
	165215					
	161535					
	97841					
SL-SF	1960					

[fol. 403] The Court: We will adjourn until 9:30 A. M. tomorrow morning.

(Court re-convenes at 9:30 A. M., May 12, 1944, pursuant to adjournment and hearing of the above entitled case is resumed, Mr. Keith Murphy being recalled to the witness stand for further direct examination by Mr. R. B. Hamer).

2966 Q. Handing you what has been marked by the reporter as Exhibit number 36, I will ask you if that is another one of these industrial reports or industrial records which you made, and is it in your handwriting?

A. Yes.

2967 Q. On what date did you make that record?

A. 10-9-42.

2968 Q. That would be October 9, 1942?

A. Yes, sir.

2969 Q. Was that record made with respect to the movement of cars handled on that day?

A. Yes.

2970 Q. Who were your helpers on that day?

A. Chown and Ellis.

2971 Q. Does Exhibit number 36 contain a record with respect to the movement of a loaded car from the Casein Spur track on that day?

A. Yes.

2972 Q. At what time was that movement handled or taken from the Casein Spur track?

[fol. 404] A. 9:00 P. M.

2973 Q. Is Exhibit number 36 in the same condition now as at the time you made it and turned it in to the yard office, except for what has been written on it in ink, and the red check marks?

A. Yes.

2974 Mr. Hamer: Defendant offers in evidence Exhibit number 36, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 36 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 404a)

Defendant's Exhibit No. 36

Station _____ Date _____ 19

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Sex	Ld or Mty	TAKEN From	TAKEN To	Time Set
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

404a

[fol. 405] 2975 Q. Handing you what has been marked by the reporter as Exhibit number 37, I will ask if that is another one of the industrial records made by you, and in your handwriting?

A. Yes.

2976 Q. On what date was that record made?

A. October 14, 1942.

2977 Q. Were you the foreman at that time?

A. Yes.

2978 Q. Who were your helpers on that date?

A. Chown and Ellis.

2979 Q. Does that record, Exhibit number 37, contain an entry with respect to the movement of a loaded box car from the Casein Spur track?

A. Yes.

2980 Q. At what time was that movement handled?

A. 9:35 P. M.

2981 Q. Is Exhibit number 37 in the same condition as it was when you made it and turned it in to the yard office, with the exception of a couple of red check marks, and some writing in ink?

A. Yes.

2982 Mr. Hamer: Defendant offers in evidence Exhibit number 37, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 37 having been offered in evidence, and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 406)

Defendant's Exhibit No. 37

Station _____ Date _____ 19__

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[fol. 407] 2983 Q. Handing you what the reporter has marked as Exhibit number 38, is that another one of these industrial records made by you?

A. Yes.

2984 Q. And on what date was that record made?

A. October 16, 1942.

2985 Q. And you were the foreman on that day?

A. Yes.

2986 Q. Who were your helpers?

A. Ellis and Chown.

2987 Q. Does Exhibit number 38 contain an entry showing that a loaded box car was taken from the Casein Spur track on October 16, 1942?

A. Yes.

2988 Q. At what time of the day was that movement handled?

A. 11:15 P. M.

2989 Q. Is exhibit number 38 in the same condition as it was at the time you made it and turned it in to the yard office, with the exception of some writing in ink and some red check marks?

A. Yes.

2990 Mr. Hamer: Defendant offers in evidence Exhibit number 38, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 38 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 408)

Defendant's Exhibit No. 38

Station [illegible] Date 7 [illegible] 19 —

Engine No. [illegible] Foreman [illegible]

Helpers [illegible]

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	NP	[illegible]
[illegible]	79623	F	—	[illegible]	[illegible]	—
[illegible]	600324	—	—	[illegible]	[illegible]	—
RI	C 2013	R	X	[illegible]	[illegible]	—
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SP	33527	F	X	[illegible]	[illegible]	[illegible]
CNW	51476	R	X	[illegible]	[illegible]	[illegible]
SP	62093	R	X	[illegible]	NP	[illegible]
[illegible]	176040	R	X	[illegible]	[illegible]	[illegible]
CNW	62318	—	—	[illegible]	[illegible]	[illegible]
IM	1423	R	X	[illegible]	[illegible]	[illegible]
TNO	39763	—	—	[illegible]	[illegible]	[illegible]
SP	69834	—	—	—	[illegible]	[illegible]
UP	161038	—	—	—	[illegible]	[illegible]
SP	27290	—	—	[illegible]	[illegible]	[illegible]
RI	62156	R	X	[illegible]	[illegible]	[illegible]

[fol. 409] 2991 Q. Showing you what the reporter has marked as Exhibit number 39, is that another one of the industrial records made by you, as foreman?

A. Yes.

2992 Q. And on what date was that record made?

A. October 19, 1942.

2993 Q. Was that made with respect to movements which were handled by you and your crew on that date?

A. Yes.

2994 Q. Does exhibit number 39 contain an entry with respect to the movement of a car, a loaded box car, from the Casein Spur track on that day?

A. Yes.

2995 Q. At what time of the day was that movement handled?

A. 5:15 P. M.

2996 Q. Is Exhibit number 39 in the same condition as it was at the time you made it out and turned it in to the yard office, with the exception of what has been subsequently written on it in ink?

A. Yes.

2997 Mr. Hamer: Defendant offers in evidence Exhibit number 39, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: No objection.

Defendant's Exhibit Number 39 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 410)

Defendant's Exhibit No. 39

Station [illegible] Date [illegible] '19

Engine No. Foreman

Helpers

CAR Initial	CAR Number	Empty or Load	Ld or Empty	TAKEN From	TAKEN To	Time Set
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[fol. 411] 2998 Q. Referring again to Exhibit number 39, Mr. Murphy, I note that the first entry on Exhibit number 39 is with respect to a movement from the Casein Spur at 5:15 P. M., then I note that the next entry has a series of marks or dashes immediately below the first entry. What do those indicate?

A. Well, that is my ditto mark.

2999 Q. Did you have then two cars, two loaded cars, that were taken from the Casein Spur on that date and on that occasion?

A. Yes.

3000 Q. And wherever on these records which you have made, and which have been offered in evidence here, a straight line appears below in the columns, do those indicate ditto marks?

A. Yes.

3001 Q. And is that true with respect to all movements from other places and other tracks, as well as the Casein track?

A. Yes.

3002 Q. Now I note further, Mr. Murphy, that on Exhibit number 39 the first two entries are shown with respect to movements handled at 5:15 P. M. and the next several entries are with respect to a movement which was handled at 4:30 P. M. Is that correct?

A. Yes.

3003 Q. Now I wish you would explain to the Jury, Mr. Murphy, the reason, if you know, why in making out this record on that day, you made the record apparently with respect to movements from the Casein track before you made your entries on the record with respect to the other movement. Where were those other movements from?

[fol. 412] A. That is Middelton.

3004 Q. Will you explain why in this instance the entries appear to be made on Exhibit number 39 with respect to the movement from the Casein track, ahead of the entries with respect to Middelton, although the former were made at a later time in the day?

A. That was due to the fact that I switched the Middelton industry before I switched Casein, and I set these cars out but didn't enter them in the book at the time I switched the industry.

Mr. Tautges: Just a little louder.

A. (continued) I say I switched this Middelton movement before I switched Casein and set these cars out on what I call the team track, then went in and switched the Casein industry and entered the cars I got from Casein on the industry report, then later went by these cars I had previously taken from Middelton and entered them in my industry book, and at the time I entered them in the book it was obviously later than 5:15, but I marked the entry 4:30 P. M. because that is approximately the time I switched at Middelton, and I entered them at a later hour than I actually had switched them, but put the correct switching time on the industry report.

3005 Q. When you had taken the cars from Middelton off of the spur track that services them, you had taken them to some other track between the Middelton spur and where the Casein spur is located?

A. Yes.

3006 Q. And at the time you did that did you know that you were going down to the Casein spur?

A. Yes.

[fol. 413] 3007 Q. And at the time you did that did you also know that after switching at the Casein spur it would be necessary for you to come back?

A. Yes, because that was the only way out of there.

3008 Q. And pick up the cars that you had previously taken off of the Middelton spur?

A. Yes.

3009 Q. Referring again, Mr. Murphy, to exhibit number 34, I note that on Exhibit number 34 it appears that the first entry which you made on that sheet was with respect to a movement at Casein at 9:50. Is that right?

A. Yes.

3010 Q. Then I note below that you had a movement of cars from Middelton, which appears upon here at 9:20. Is that right?

A. Yes.

3011 Q. Does that involve the same situation as the movement on October 19th, that you have explained?

A. Yes, that is the same type of switch movement.

3012 Q. And is that another situation where the cars were taken from the Middelton Spur; set out on the track and that at that time you knew you were going down to Casein to

pick up a car down there, and you made your record at Casein then came back and made up your record at the time you picked up the Middelton cars from the track where they had been left?

A. Yes, sir.

3013 Q. And you entered the time they had been taken from the Middelton spur?

A. Yes.

[fol. 414] 3014 Q. Now without going over all of these exhibits which you have previously identified, to determine whether or not there does appear on the face of the exhibits any departure from following the regular sequence, I wish you would state to the Jury what your practice and custom was with respect to making these records, that is, as you went along.

A. Normally we would enter the car and the industry from which we got it, or at which we spotted the car, and we would enter the destination of the car and also the time at which we made the switch movement.

3015 Q. And did you do that generally at the time that the movements were being made?

A. Yes.

3016 Q. Was there any time, Mr. Murphy, during the period covered by these records where you have shown that Mr. Ellis was your helper, where Mr. Ellis did not remain as your helper throughout your shift and throughout the time that you were foreman?

A. I have no memory of him not working a complete shift.

3017 Q. Did your full crew go along with you as the foreman in connection with the handling of these movements from one industry track to another?

A. Yes.

3018 Q. Do you ever know of any time when there was ever any departure from that?

A. Well, it is possible when your industries are close together that one member of the crew might walk from one industry to the other.

3019 Q. How far is it from Middelton down to Casein?

A. Oh, two and a half city blocks, I would judge.

[fol. 415] 3020 Q. Do you recall any time when Mr. Ellis ever walked from Middelton down to the Casein spur?

A. No.

3021 Q. What shift were you and your crew on during the time that was covered by these records, from July up to the 19th of October?

A. We went on duty at 2:30 P. M. and worked eight hours, and any overtime that might have occurred.

3022 Q. So that where your records show that movements were being made as late as 11:15 P. M. at the Casein spur, that would be on some occasion when you were working over time?

A. Yes.

3023 Q. When did you first go on that job, on that shift? Do you recall approximately?

A. Oh, approximately the 10th or 12th of July.

3024 Q. 1942?

A. Yes.

3025 Q. And how long did you remain on that shift as foreman?

A. Well, until approximately the middle of September.

3026 Q. Well, do you mean that, or the middle of October?

A. October, excuse me.

3027 Q. Refreshing your recollection again from Exhibit number 39, that shows October 19th.

A. Yes, sir.

3028 Q. Were you still on the 2:30 shift at that time?

A. Yes, sir.

3029 Q. Had you been on some other shift that handled work in some other parts of the yard before you went on this 2:30 shift?

A. Yes.

3030 Q. And when you left the 2:30 shift, was your work in the same locality in the yards, or was it in some other locality?

[fol. 416] A. No, it was another locality.

3031 Q. Did you ever work as a foreman or helper in the part of the industrial district of Seattle where the Casein Company is located, after you left that 2:30 shift some time in October, 1942?

A. I have no memory of working there since then.

3032 Q. During the time you were foreman there, Mr. Murphy, will you tell the Jury whether or not you recall, but without respect to any particular day, whether you had the situation of taking out a loaded car which would be spotted, say down at the second or third loading dock of the

Casein Company, when there were other cars at either the first or second door?

A. Yes, we have had occasion to take cars out from the second or third door and re-spot the cars at either door one or two.

3033 Q. Did that happen just once, or do you recall more than that?

A. No, it has happened more than once. Normally there were from two to three cars in on this Casein spur.

3034 Q. And when you had that situation, and the load being the second car, was it necessary and did the crew under your direction respot the car that was on the track ahead of the load on the Casein spur, ahead of the load or between the loaded car that was to be taken out, and the switch?

A. Do you mean, was the car respotted?

3035 Q. Yes.

A. Yes.

3036 Q. Now during the time you were on that job, do you recall whether there were occasions when in connection with taking a load out of the Casein Spur and respotting cars, it was necessary to handle tank cars that might be spotted up here on the Myrtle Street track?

[fol. 417] A. Yes, it was necessary to respot them whenever a tank car was there.

3037 Q. You testified, as I recall yesterday, that most of the time while you were the foreman on that shift handling the work down in the industrial district where the Casein Company is located, that Mr. Ellis was the field man?

A. Yes, sir.

3038 Q. During that time did Mr. Ellis perform the duties of a field man while working with you?

A. Yes.

3039 Q. Just generally, what were they?

A. Well, normally a field man,—their duties would be to couple up the cars at the industry, prior to taking them out of the industry, and also to respot the cars.

3040 Q. And in doing that work under your direction during that period, did that take Mr. Ellis or the field man back to the loading docks along the west side of the Casein Building, where these cars were?

A. Yes.

3041 Q. And when you had a situation of having to move a tank car on the Myrtle Street track off spot and then respot it, what duties did the field man have in connection with that movement?

A. Well, he probably would not have any duty. He would either have to ride up and throw the switch to let the engine and any cars the engine might have out, or the foreman would do it. Probably the pin-puller would respot the tank car.

3042 Q. When you say switch, are you referring to the switch in to the Casein Spur track?

A. Yes.

[fol. 418] Mr. Hamer: You may inquire.

Cross examination.

By Mr. Tautges:

3043 Q. Mr. Murphy, since the time that you made these industrial records and turned them in to the company, when did you first see them after that?

A. In Mr. Hamer's office.

3044 Q. In Mr. Hamer's office here in Omaha?

A. Here in Omaha, yes.

3045 Q. And that was within a day or two?

A. I think first I saw them on Saturday I believe, this previous Saturday, this last Saturday.

3046 Q. Last Saturday?

A. I believe that was the day.

3047 Q. I suppose that it was from those records that you refreshed your recollection of working in and about the Casein spur?

A. Yes.

3048 Q. In other words, if you hadn't seen the records you wouldn't have remembered how many times you had been in there, would you?

A. No, that is impossible, such a long time ago and the number of times we have been in.

3049 Q. Did you work in and about the Casein spur when there was someone else besides Mr. Ellis a member of your crew?

A. Yes.

3050 Q. In the summer and fall of 1942, did you have an assignment that carried you into this industrial zone right along?

A. Yes, I did.

3051 Q. And I take it that at various times you would have different helpers?

[fol. 419] A. Yes, that is very possible.

3052 Q. These industrial records merely show a part of the work, do they not, that you were doing while working on any particular shift?

A. They would show a complete record of cars taken to an industry or taken from an industry.

3053 Q. Yes, but what I meant to bring out was, that in addition to that character of the work you did, your crew had a lot of other work to do besides that?

A. Oh, yes.

3054 Q. Now this Middelton spur that is mentioned in some of these records, I understood you to say that that was several blocks away from the Casein spur?

A. Yes, sir.

3055 Q. And what you call the Middelton spur, is that some lumber company?

A. It was a lumber company, but since that time it has burned down. It is no longer there.

3056 Q. How long have you worked for the Union Pacific Railroad Company altogether?

A. Since March 29, 1941.

3057 Q. Before that, in what work were you engaged?

A. Railroad work,—logging railroad.

3058 Q. How many years of experience have you had altogether in railroading?

A. Well, prior to working with the Union Pacific, I had approximately three years with that logging railroad.

3059 Q. Now I suppose that on these different movements that you made in and about the Casein spur track, you don't remember the details, either of what you did or what your helpers did, do you?

[fol. 420] A. If you mean if I could pick one specific movement out of something that happened that long ago, I can't, but as a general movement, I can.

3060 Q. So that your testimony in part is based upon what you generally did in that type of work?

A. Yes.

3061 Q. Now as to how many times Mr. Ellis worked as field man or how many times he actually worked as head switchman or pin-puller, you have no accurate recollection of that?

A. No, it wasn't required that we keep an accurate record of that.

Mr. Tautges: I think that is all.

Redirect examination.

By Mr. Hamer:

3062 Q. Mr. Murphy, before you saw any of the records in my office, did you know from your own recollection and memory that during the year 1942, during the summer, you had been foreman of a crew that worked for sometime on the Casein spur track, among others?

A. Yes.

3063 Q. Handing you, Mr. Murphy, what has previously been identified as Exhibit number 11, do you recognize that as a picture of a part of the Casein building and Casein Spur track?

A. Yes.

3064 Q. Do you also observe in that picture an impaired clearance sign between the building and the Casein Spur track?

A. Yes.

3065 Q. Now then, during the time that you were there in the summer and fall of 1942, was there an impaired clearance sign in the same position where this one is that is shown in the photograph, Exhibit number 11?

[fol. 421] A. It looks very natural. I would say that there was.

3066 Q. And from your examination of the picture are you able to determine from your recollection whether that is the same sign, or whether it is one that looks like the same one?

A. Well, it sure looks the same.

Mr. Hamer: That is all.

Recross examination.

By Mr. Tautges:

3067 Q. Mr. Murphy, when was your attention first directed to this impaired clearance sign?

A. Mr. Peterson, in Seattle, asked me if there was an impaired clearance sign.

3068 Q. Who is Mr. Peterson?

A. He is a claim agent for the Union Pacific.

3069 Q. One of the claim agents for the Union Pacific?

A. Yes, sir.

3070 Q. When did you first talk with Mr. Peterson about the matter?

A. I think it was the 29th or 30th of last month.

3071 Q. That would be of April?

A. Yes. I don't remember the exact date.

3072 Q. Where did you talk with Mr. Peterson about it?

A. In the yard office.

3073 Q. In Seattle?

A. Yes.

3074 Q. Did he request you to come there?

A. He caught me as I came off shift.

3075 Q. Did he have any picture there at that time?

A. No, sir.

[fol. 422] 3076 Q. Until he mentioned, or until he talked with you about the impaired clearance sign, had you given the matter any thought before that?

A. Yes, I had.

3077 Q. And when was that?

A. Shortly after Mr. Ellis was injured.

3078 Q. How did you happen to give thought to the matter at that time?

A. I knew of the close clearance, and the crew that I was working with brought the matter up, or somebody in the crew brought the matter up, if there was an impaired clearance sign there.

3079 Q. That is, some member of your crew?

A. Yes, the crew that I was working with.

3080 Q. Did you ever make any close observation of the sign, as shown here in the picture?

A. No.

3081 Q. After you talked with Mr. Peterson, the claim agent, did you go to look at the sign that was there at that time?

A. No.

3082 Q. So you can't tell us whether or not at that time the sign looked like a new one or not?

A. I didn't understand.

3083 Q. I say, so that you can't tell us whether or not at the time you talked with Mr. Peterson about the impaired clearance sign,—you can't tell us whether that was a new sign or not?

A. No, I couldn't.

3084 Q. And you don't know now whether that sign that is shown in the picture here is a new sign or not, do you?

A. I don't think the photograph would show whether it was new or old.

[fol. 423] 3085 Q. Well, I say you don't know?

A. No, I don't know.

3086 Q. After a sign in that district is up for a number of years, and exposed to the elements, it does get somewhat weather beaten doesn't it?

A. Yes.

3087 Q. And the words, being exposed to the elements and the sun, the paint will fade out won't it?

A. It probably would.

3088 Q. And you have noticed and observed that sometimes signs that were old were rather indistinct, have you not?

A. That is right.

3089 Q. And in that district there is considerable exposure to rain and fog is there not?

A. Yes.

3090 Q. And that territory, at least during the winter and spring months, is usually quite damp is it not?

A. That is right.

3091 Q. How far is this particular district from salt water?

A. Well, the Sound itself is probably two miles. The river,—I don't know whether the salt water backs up that far.

3092 Q. But Puget Sound is salt water isn't it?

A. Yes, sir.

3093 Q. And the City of Seattle is built on both sides of the Sound is it not, in part?

A. Yes.

3094 Q. And have you noticed that in the vicinity of salt water, the atmosphere and the general air conditions are such that it is pretty hard on paint?

[fol. 424] A. I have never particularly noticed it on paint.

Mr. Tautges: That is all.

Redirect examination.

By Mr. Hamer:

3095 Q. Mr. Murphy, just one other question. During the course of your work you have observed other impaired clearance signs throughout the industrial district have you?

A. Yes.

3096 Q. Can you tell us approximately what the height of those signs generally is?

A. Oh, I would say they are usually about at a man's eye level when he is standing on the step of a car.

3097 Q. About how high would that be, if you know?

A. Oh, I would estimate possibly eight or nine feet from the ground.

Mr. Hamer: That is all.

Mr. Tautges: I think that is all.

Witness excused.

[fol. 425] Mr. Edwin P. Field, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. R. B. Hamer:

3098 Q. Will you state your name?

A. Edwin P. Field.

3099 Q. Where do you live?

A. 6141 Maynard Avenue, Seattle, Washington.

3100 Q. How long have you lived in Seattle?

A. I have lived there since October, 1942.

3101 Q. By whom are you now employed?

A. The Union Pacific.

3102 Q. How long have you been employed by that company?

A. Since October 9, 1942.

3103 Q. Your employment has been as what?

A. As a switchman.

3104 Q. In Seattle?

A. At the Argo Yards.

3105 Q. Were you a member of the switching crew under the supervision of Mr. Ellis on the day that Mr. Ellis was injured?

A. Yes, sir.

3106 Q. What was your position in working on that crew?

A. Following the engine, or pin-puller.

3107 Q. Is that one and the same thing, following the engine and pin-puller?

A. Yes, sir.

3108 Q. Do you recall, Mr. Field, what shift you were on on that day?

A. I went to work at four o'clock in the afternoon and worked until twelve.

[fol. 426] 3109 Q. How long had you been working with Mr. Ellis?

A. That was his third shift with us.

3110 Q. How long had you, yourself, been on that four o'clock shift?

A. Oh, I had been on that shift since January of that year.

3111 Q. When you were on the shift in January were you under the supervision of some other foreman?

A. Several of them.

3112 Q. And when with respect to the time that you went on that shift in January did you first start going down into the district where the Casein Company and Continental Can Company are located?

A. Oh, off and on all the time, pretty near every day or so,—something like that.

3113 Q. That would be from and after some time in January, 1942?

A. That is right.

3114 Q. Is there just one way to get in to the Myrtle Street track?

A. Yes, sir.

3115 Q. Which way is the engine headed when you come in on Myrtle Street?

A. When we come in on Myrtle Street the engine is headed east.

3116 Q. Then when you handle cars into the Casein Spur is the engine always making back up movements?

A. Yes, sir.

3117 Q. Coming down to the day that Mr. Ellis was injured, do you recall that a couple of cars were taken off of the Casein Spur track?

A. Yes, sir.

3118 Q. Was there a tank car, on that day, spotted out on the Myrtle Street track?

A. Yes, sir.

3119 Q. And what if anything was done by you, or that you observed, in connection with the movement coming out of the Casein Spur with the two cars?

[fol. 427] A. Well, my place was at the head end of the engine. The engine was headed east to make the coupling on the tank car, so we could get out with the two cars.

Mr. Hamer: May I withdraw this witness temporarily and call the doctor, so that he may get away.

The Court: Yes.

Witness excused temporarily.

Dr. R. W. Fouts Direct Examination omitted by stipulation.

[fol. 428] Mr. Edwin P. Field, being recalled by Mr. R. B. Hamer for further direct examination, having been previously sworn, on behalf of the Defendant testified as follows:

Direct examination.

Continued by Mr. R. B. Hamer:

3316 Q. After the engine pulled the two cars out of the Casein Spur and passed over the Casein Spur switch, it came to a stop did it before it got to the tank car?

A. Yes, sir.

3317 Q. Then what did it do?

A. Well, I was there at the tank car to make the coupling so they could proceed ahead a little more.

3318 Q. You coupled the tank car on to the front end, the pilot end of the engine?

A. Yes, sir.

3319 Q. And after that coupling was made was it necessary for someone in the crew to line the switch into the lead?

A. Yes, sir.

3320 Q. Did you line that switch?

A. No, sir.

3321 Q. Do you know who did?

A. No, sir, it wasn't no difference to me.

3322 Q. The switch was lined, however, and the engine with the two box cars behind it and with the tank car coupled on to the front end of the engine then moved which way?

A. That would be west, on the main line we call it.

3323 Q. Now where did you stay during that time that the movement was being made to the west along the Myrtle Street track?

A. At the place where the tank car was spotted.

3324 Q. Where it had been spotted?

[fol. 429] A. Yes, sir.

3325 Q. You remained there, did you?

A. Yes, sir.

3326 Q. What was the next thing you did after that, Mr. Field?

A. Well, I stayed there until they made their proper move up there with their cars. I just stayed there until they came back.

3327 Q. They came back, did they?

A. Yes, sir.

3328 Q. With the tank car still on the front end of the engine?

A. Yes, sir.

3329 Q. And how many cars were on the rear end when they came back?

A. One car.

3330 Q. Then what was done with the tank car?

A. We spotted the tank car in its proper place and I cut it off and gave the engineer a little back up sign to get away from it, and the switch was properly throwed and they went back into the Casein Spur.

3331 Q. You were the one who cut the tank car off, were you?

A. Yes, sir.

3332 Q. Was it necessary after the tank car was cut off for somebody then to line the Casein switch to permit the back-up movement on to the Casein switch?

A. Yes, sir.

3333 Q. Do you know who did that?

A. No, sir, I don't. I had my back to it.

3334 Q. You didn't line the switch?

[fol. 430] A. No, sir.

3335 Q. After the movement started back on to the Casein Spur switch, where were you? What were you doing?

A. I was walking around, just leisurely, toward Myrtle Street, because there wasn't no use of me being down there.

3336 Q. Did you see Mr. Ellis at that time?

A. He was on the crossing.

3337 Q. On which side of the track was he, the east side or the west side?

A. That would be the east side of the track, the engineer's side.

3338 Q. When you say on the crossing, do you mean where the spur crosses Myrtle Street?

A. Yes, sir.

3339 Q. Which way was he walking, or what was he doing?

A. He was standing there flagging the crossing, as we call it.

3340 Q. Then what did he do?

A. As the car went by he walked slowly, with the car.

3341 Q. Walking which way?

A. That would be south, toward the Casein plant.

3342 Q. Did he cross the track to the west, or did he remain on the east side of the track?

A. He stayed on the east side of the track.

3343 Q. Did he remain on the east side of the track until he got out of your sight?

A. Yes, sir.

3344 Q. And what took him out of your sight?

A. The Casein Building.

[fol. 431] 3345 Q. Is this a correct summary then of what you saw, Mr. Field? The tank car was spotted somewhere in here, where I am pointing with the pencil?

A. Yes, sir.

3346 Q. Somebody lined the switch and the movement started back?

A. Yes, sir.

3347 Q. You started then walking alongside of the engine?

A. Yes, sir.

3348 Q. Were you up toward the front end of the engine, or the rear end?

A. It would be the front end.

3349 Q. And that is when you observed Mr. Ellis?

A. Yes, sir.

3350 Q. And you say he was on the crossing, somewhere here on Myrtle Street?

A. Yes, sir.

3351 Q. On the east side of the track?

A. Yes, sir.

3352 Q. And he started to walk along by the front end of the car, and you continued to watch him until he got around this building at some point which took him outside of your vision?

A. That is right.

3353 Q. Now did you see Mr. Ellis after that until the movement came to a stop?

A. No, sir, not after he went out of sight.

3354 Q. Where was the rear end of the engine as distinguished from the tender, as you observed it, when the movement came to a stop, if you know?

A. Well, to tell you the truth, I didn't pay much attention to that.

[fol. 432] 3355 Q. All right, what occurred after the movement came to a stop?

A. That is, after the car was switched into Casein?

3356 Q. Yes.

A. Well, the engineer hollered to me.

3357 Q. What did you do when he hollered to you?

A. I run, immediately.

3358 Q. And where did you go?

A. Toward Newt Ellis.

3359 Q. Did you go between the car and the building?

A. Yes, sir.

3360 Q. When you got to Mr. Ellis, was Mr. Brown there?

A. Yes, sir.

3361 Q. On which side of Mr. Ellis were you?

A. I was on the north side of him.

3362 Q. And on which side of Mr. Ellis was Mr. Brown?

A. He would be on the south side of him.

3363 Q. After that, after you and Brown arrived there, did you then give some directions to the engineer as to what to do?

A. Yes, sir.

3364 Q. What did the engineer do after you gave him some directions?

A. He obeyed my directions.

3365 Q. All right, what did the car do that was attached to the engine?

A. It moved very slowly.

3366 Q. About how far?

A. I would say between sixteen and eighteen inches.

3367 Q. Which way?

A. That would be east, or north.

3368 Q. Well, the car would be north and the engine would be headed toward the east, is that right?

A. Yes, sir.

[fol. 433] 3369 Q. Then what was done after that, so far as any movement was concerned? What other directions did you give?

A. Well, we thought he went too far and the car rebounded just a couple of inches, that is all, and there was no other movement at all; until we got Mr. Ellis out.

3370 Q. Were you able to get him out before the movements were made?

A. No, sir.

3371 Q. How long did it take after you got back to him until those movements were made and you got Mr. Ellis out?

A. It couldn't have been very long. I wouldn't say over five or six minutes or so. It couldn't have been very long.

3372 Q. Did you remain there until the ambulance arrived?

A. Yes, sir.

3373 Q. Did you stay there after the ambulance came and Mr. Ellis left in the ambulance?

A. Yes, sir.

3374 Q. Was it necessary to move the cars one way or the other to permit Mr. Ellis to be put into the ambulance?

A. Yes, sir.

3375 Q. Do you remember whether that movement was made just before the ambulance arrived, or was it made some little time before?

A. It was made before the ambulance arrived, so we could clear Myrtle Street.

3376 Q. So you could clear Myrtle Street?

A. That is right.

3377 Q. Well which way was that movement made, in toward the end of the spur, or toward Myrtle Street?

A. Moved toward the east, out toward Myrtle Street.

3378 Q. Now after the ambulance had taken Mr. Ellis [fol. 434] away was the car that was involved in this accident respotted in the position where it was at the time you first went to Mr. Ellis' assistance?

A. Yes, sir.

3379 Q. And were you present at the time that was done?

A. Yes, sir.

3380 Q. Do you recall at whose direction it was that the car was respotted there?

A. No, I don't, sir.

3381 Q. Had there been some other men arrive at the scene of the accident before the car was respotted and after the ambulance left?

A. Oh, some of the employees around the different buildings had been there.

3382 Q. Do you remember whether there were any railroad men?

A. No, sir, just I,—Oh, I believe Mr. Coburn was the one who had the car respotted.

3383 Q. Who was Mr. Coburn?

A. Our superintendent.

3384 Q. After the car was respotted, where did you go?

A. I just stood around there until further orders.

3385 Q. After the car was respotted was the car cut off from the engine?

A. No, sir.

3386 Q. After it was respotted?

A. No, the engine was still on it.

3387 Q. Did the engine remain there?

A. For a while it did.

3388 Q. It wasn't cut off for some time was it, that evening?

A. The only time it was cut off was when they sent us home.

3389 Q. You left with the engine, did you?

[fol. 435] A. Yes, sir.

3390 Q. After the car had been respotted was it moved after that until you left with the engine?

A. No, sir.

3391 Q. As I recall you testified that you first started working down in that vicinity some time the preceding January. Is that right?

A. Yes, sir.

3392 Q. Now prior to the day that this accident occurred and while you were working down on the Myrtle Street track in connection with movements that were going into the Casein Spur, had you observed an impaired clearance sign?

A. Yes, sir.

3393 Q. Did the sign which you had seen before this accident, Mr. Field, appear to you as the sign does which is shown in the picture, Exhibit number 11?

A. That is the same old sign.

Mr. Hamer: You may cross examine.

Cross examination.

By Mr. Tautges:

3394 Q. Mr. Field, when did you come to Omaha?

A. A week ago today.

3395 Q. Who did you come with?

A. Mr. Murphy.

3396 Q. Anyone else?

A. No, sir.

3397 Q. And I suppose that since you have been here in Omaha you have talked over with someone what you were going to testify to?

A. I talked it over with the lawyers.

3398 Q. Did you talk with anyone else?

A. No, sir, only Mr. Murphy and myself talked.

[fol. 436] 3399 Q. Now then, before you left Seattle to come to Omaha, did you talk over with anyone what you were going to testify to?

A. No, sir.

3400 Q. Who instructed you to come to Omaha?

A. I was instructed by the lawyers, by the company.

3401 Q. Well, who out at Seattle told you to come?

A. Well, I received the letter through Mr. Coburn.

3402 Q. Now before you left Seattle to come to Omaha did you ever talk with the claim agent about what you knew about the accident and what you were going to testify to?

A. Only at the time of the accident.

Mr. Hamer: Objected to as a double barreled question, improper and misleading. It is two questions in one.

(No ruling).

3403 Q. Well before you left Seattle, that is, since the accident and before you left Seattle, did you ever talk with the claim agent of the company as to what you knew about it?

A. We had to do that. That is the rule.

3404 Q. When did you have to do that?

A. It was shortly after the accident.

3405 Q. And who did you talk with?

A. I believe it was Mr. Thomas at that time.

3406 Q. And you gave some kind of a written statement did you, at that time?

A. Yes, sir.

3407 Q. And that written statement, I presume, was written up by the claim agent?

A. Yes, sir.

[fol. 437] 3408 Q. On the typewriter?

A. I suppose it was.

3409 Q. Well, were you present when the statement was written up or did you see it after it was written up?

A. Well, I had to make my statement to him and he wrote it down himself.

3410 Q. Did he write it down on the typewriter?

A. Yes, sir.

3411 Q. Now then, after that did you talk with the claim agent again?

A. I believe there was another claim agent took his place, but I don't know what his name was.

3412 Q. Was that Mr. Watts?

A. No.

3413 Q. When, approximately, was that?

A. Oh, that was quite a while after. I don't know when it was, just exactly, because Mr. Thomas had left the service of the company.

3414 Q. You were subpoena-d as a witness by the plaintiff to have your deposition taken at Seattle some time early in March, were you not?

A. Yes, sir.

3415 Q. And either immediately before, or about the time that your deposition was to be taken, did you have some talk with the claim agent?

A. No claim agent, no, sir.

3416 Q. As I understand it you were subpoena-d and given a witness fee to appear at the place where your deposition was to be taken?

A. No witness fee.

[fol. 438] 3417 Q. You did not appear at the place where your deposition was to be taken, did you?

A. No, sir.

3418 Q. Why not?

A. Because there wasn't nobody come after me.

3419 Q. Well didn't you tell Mr. Estes that you were going to pick him up and come down there with him?

A. No, sir, I made arrangements with Mr. Buzard the morning before.

3420 Q. Mr. Buzard was the engineer?

A. Yes, sir.

3421 Q. And you expected him to pick you up and bring you down there?

A. Yes, sir, that is right.

3422 Q. Now prior to March 15, 1943, had you worked with Ellis?

A. No, I think that is the first time I ever worked with Mr. Ellis, when he became foreman on the job.

3423 Q. That was the first time you ever knew who he was?

A. Oh, I had seen him around the yard, but I never had worked with him before.

3424 Q. Did you know that he was a new foreman?

A. He had been foreman quite a while in there, but he was a new man on our job that day.

3425 Q. So that as far as your knowledge is concerned, that was the first time that Mr. Ellis ever worked in or about the Casein Spur?

A. That is, as far as I know.

3426 Q. Now I suppose that on that day you were quite busy attending to your part of the work?

A. Yes, sir.

3427 Q. You didn't pay any particular attention to Ellis or what he was doing, did you?

[fol. 439] A. No, sir.

3428 Q. You knew that he was somewhere at or about the place there, on the job?

A. Yes, sir.

3429 Q. You didn't pay any particular attention as to where it was that he crossed the Casein Spur from the west to the east side, did you?

A. No, sir, because I had other duties of my own to take care of.

3430 Q. You were busy taking care of your part of the work?

A. That is right.

Mr. Tautges: I think that is all, Mr. Field.

Redirect examination.

By Mr. Hamer:

3431 Q. Did you wait at your home on the day the deposition was to be taken, for Mr. Buzard?

A. Yes, sir.

3432 Q. When he didn't show up, what did you think?

A. Well, I thought he didn't need me or anything, because it was agreed that if he heard anything he would come down after me.

Mr. Hamer: That is all.

Mr. Tautges: That is all.

Witness excused.

[fol. 440] Mr. Melburn H. Estes, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. R. B. Hamer:

3433 Q. Are you Melburn H. Estes?

A. Yes, sir.

3434 Q. You live in Seattle, Mr. Estes?

A. Yes, sir.

3435 Q. How long have you lived there?

A. About ten years.

3436 Q. And by whom are you employed at this time?

A. The Union Pacific Railroad.

3437 Q. How long have you been employed by that company?

A. Since July 11, 1917.

3438 Q. What has been the nature, generally, of the work you have done for the Union Pacific?

A. I worked as a trainman until December 1, 1940. On that date I was appointed general yard master, at Seattle, Washington.

3439 Q. When you say you worked as a trainman, what do you mean by that?

A. Well, brakeman and switchman.

3440 Q. Had you been a brakeman and switchman in and about the Argo Yards and the industrial district of South Seattle?

A. Yes, sir, I had.

3441 Q. You became general yard master in 1940?

A. December 1, 1940.

3442 Q. And have you had that position since that time?

A. That is right.

3443 Q. You are the same Mr. Estes whose deposition was taken by Mr. Tautges out in Seattle, in March, 1944?

A. Yes, sir.

[fol. 441] 3444 Q. Your deposition has been offered in evidence, Mr. Estes, and I think I could save a little time, by asking for Counsel's indulgence to ask you a few leading questions to get us down to the part in which I am interested, which would be largely repetition. You were notified that Mr. Ellis had been injured in an accident at or about 7:20 P.M.

A. That is right, about 7:20.

3445 Q. And you first went out to the hospital, as I recall your deposition. Is that right?

A. That is right.

3446 Q. You did see Mr. Ellis out at the hospital, but didn't talk with him. Is that right?

A. That is right.

3447 Q. Then you left the hospital and went down to the scene of the accident at the Casein Spur?

A. Yes, sir.

3448 Q. And arrived there about 8:30 or 8:45 in the evening?

A. About 8:30 or 8:45.

3449 Q. And it was dark at the time you got there?

A. Yes, sir, it was quite dark.

3450 Q. What, if any, observation did you make there that evening, Mr. Estes, when you arrived?

A. The first thing I looked for was to see if the impaired clearance sign was there.

3451 Q. Was it there?

A. It was there.

3452 Q. Was the sign that was there that evening when you got down there, in the same position with reference to the track and the Casein Building as the sign appears in [fol. 442] the picture, Exhibit number 11?

A. Yes, in the same place.

3453 Q. How long to your knowledge, Mr. Estes, had there been an impaired clearance sign at that same location and in the same position?

A. Well, there has been one there ever since I have been around the yards in Seattle, and that is about ten years.

3454 Q. Has there been one there to your knowledge ever since you became general yard master?

A. Yes, sir, there has.

3455 Q. And these signs, impaired clearance, are they maintained and painted up from time to time?

A. Yes, sir, they are.

3456 Q. Did you also observe when you arrived there, Mr. Estes, a car on the Casein Spur track, and not at any of the loading platforms?

A. I did.

3457 Q. Did you see Mr. Coburn when you arrived there?

A. Mr. Coburn was just leaving when I arrived.

3458 Q. Was the crew still there, and the engine?

A. No, they had gone when I arrived.

3459 Q. Was anyone with you?

A. No, I was all alone.

3460 Q. Well did anyone drive there with you?

A. My wife was in the car, but she didn't get out of the car.

3461 Q. How long did you stay around there that evening?

A. Oh, possibly fifteen or twenty minutes.

3462 Q. Then you went home?

A. That is right.

[fol. 443] 3463 Q. Now did you return to the scene of the accident the following morning?

A. I did.

3464 Q. And did you observe a car that was there on the track, as to whether or not it was in the same position then on the track as it had been the night before when you observed it?

A. The same car was setting in the same position as it was the night before.

3465 Q. And the following morning what observation did you make with respect to whether the doors of the car were open, or whether the car was loaded or empty?

A. The morning of the 17th?

3466 Q. No, the morning of the 16th.

A. No, I didn't notice that morning whether the doors were open or not.

3467 Q. Did you return to the scene of the accident the following morning?

A. I did.

3468 Q. And were you accompanied by someone on that occasion?

A. I was.

3469 Q. And by whom?

A. By Mr. Thomas, the claim agent.

3470 Q. When you got there on the morning of the 17th was the car in the same position on the tracks that it had been in when you saw it the night of the 15th and the morning of the 16th?

A. In the same position.

3471 Q. And were there some pictures taken in your presence when you were out there on the morning of March 17th?

[fol. 444] A. Yes, sir, there were.

3472 Q. Handing you what has been marked by the reporter as Exhibit number 40, let me ask you to state if that is a picture that was taken by Mr. Thomas, in your presence, on the morning of March 17th?

A. Yes, sir, that is one of the pictures.

3473 Q. And is the car which is shown in this picture the one you have referred to as being in the same position as it was in when you went to the scene of the accident on March 15th?

A. That is the same car.

3474 Q. And does this picture, Exhibit number 40, correctly reflect what the situation was with respect to the car, the Casein Building, the impaired clearance sign and the tracks as they were on the morning of March 17, 1943?

A. Yes, sir, it does.

3475 Mr. Hamer: Defendant offers in evidence Defendant's Exhibit number 40.

Mr. Tautges: May I ask some questions before objecting?

The Court: Yes.

Cross examination.

By Mr. Tautges:

3476 Q. Mr. Estes, were you there when the picture was taken?

A. Yes, sir, I was.

3477 Q. Can you tell us where the camera was setting when the picture was taken?

A. Right out at the edge of the pavement.

3478 Q. What is it?

A. At the edge of the pavement on Myrtle Street.

[fol. 445] Mr. Hamer: I suggest that you show him the picture.

3479 Q. Well, it is the picture you just looked at, Exhibit number 40. (Counsel shows witness picture).

A. It was taken from right at the edge of the pavement.

3480 Q. Which way was the camera pointed?

A. Toward the car.

3481 Q. Well the camera must have been setting at some point north of what is shown in the picture, wasn't it? In other words, I am just wondering whether you realize or not that the place where the camera was setting at the time the picture was taken wouldn't show in this picture. Do you appreciate that?

A. It would have to be back from the main lead there.

3482 Q. Now then, just how far east or west of the sign that is shown in the picture, and just how far north of it,—can you tell us where that spot was where the camera was setting?

A. Well, I don't know the exact feet.

3483 Q. What is that?

A. I say I don't know the exact measurements.

3484 Q. In other words, you don't know just exactly where the camera was setting?

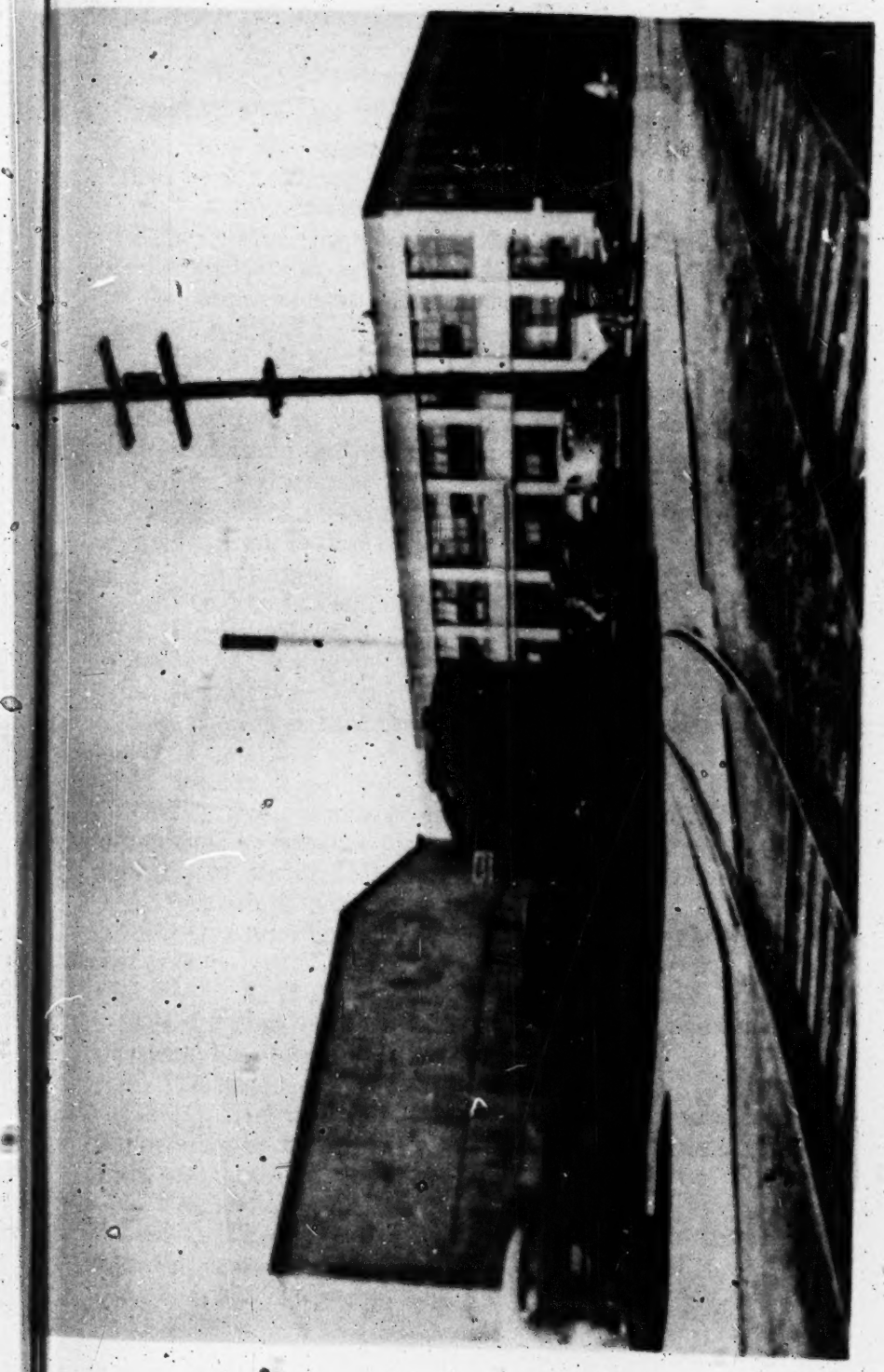
A. No, I don't. I don't know just exactly.

Mr. Tautges: That is all. We have no objection to the exhibit.

Defendant's Exhibit Number 40 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 446)

Defendant's Exhibit No. 40



[fol. 447] Direct examination.

Continued by Mr. Hamer:

3485 Q. Now Mr. Estes, at the same time, or within the space of a few minutes, were there some other pictures taken by Mr. Thomas, in your presence?

A. Yes, there were.

3486 Q. Handing you what has been marked by the reporter as Exhibit number 41, let me ask you if that is one of the other pictures that was taken by Mr. Thomas on March 17, 1943?

A. Yes, sir, it is.

3487 Q. And does that picture show the same car, in the same position, as you observed it on the evening of March 15th, and again on the morning of March 16th?

A. Yes, it does.

3488 Q. That picture is a picture of the same car in the same position, is that right?

A. That is right.

3489 Q. Of what end of the car is that a picture?

A. The south end of the car.

3490 Q. As it was on the Casein Spur?

A. Yes, sir.

3491 Q. And is that the end of the car that has the doors in it?

A. Yes, sir, it is.

3492 Q. Now, handing you Exhibit number 42, is that another view or another picture taken by Mr. Thomas on the morning of March 17th, 1943, in your presence?

A. Yes, sir, it is.

3493 Q. And what end of the car does that show in that picture?

[fol. 448] A. It shows the east end of the car.

3494 Q. That is the same car is it that is shown in the pictures, Exhibits numbers 40 and 41?

A. Yes, sir.

3495 Q. And in the same position as when you saw it on the evening of March 15th, again on the morning of March 16th, and again on the morning of March 17th?

A. Yes, sir.

3496 Q. The picture Exhibit number 41, was that taken with the camera facing generally to the north?

A. Yes, sir, it was.

3497 Q. And is Exhibit number 42 taken with the camera facing generally toward the south, or southwest?

A. Yes, sir.

3498 Mr. Hamer: Defendants offer in evidence Exhibits numbers 41 and 42.

Mr. Tautges: May I ask some questions again?

The Court: Yes.

Cross examination.

By Mr. Tautges:

3499 Q. Mr. Estes, can you tell us how far above the ground the camera was setting at the time the pictures were taken?

A. Well, I think about four or five feet off of the ground.

3500 Q. I don't suppose you could tell us at just what angle the camera itself was pointing?

A. No, I can't. I don't know.

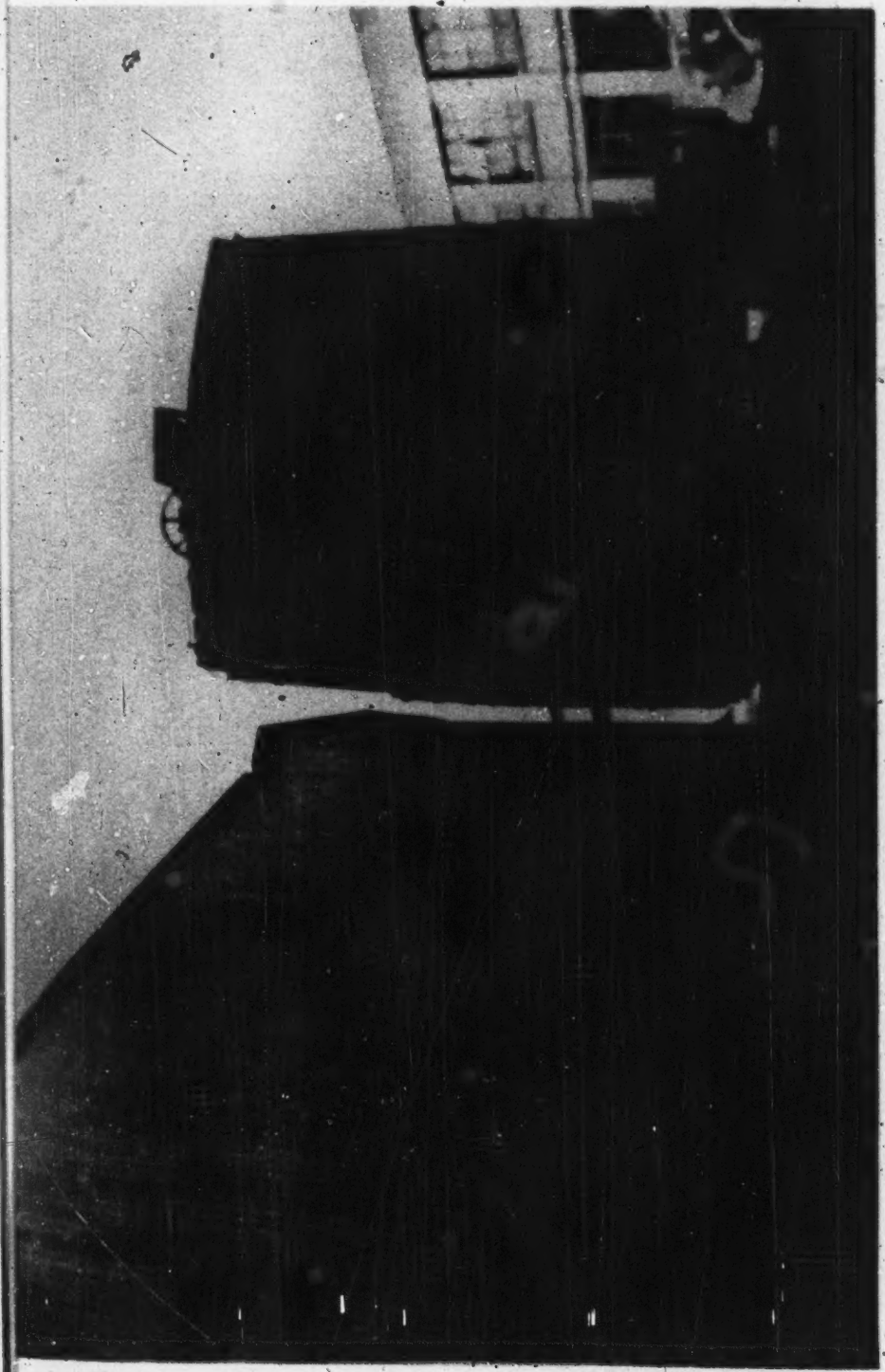
Mr. Tautges: That is all. We have no objections to the exhibits.

(Here follow 2 photolithographs, side folios 449-450)

Defendant's Exhibit No. 41

DEFENDANT'S EXHIBITS NUMBERS 41 and 42 having been offered in evidence and received without objection, same are attached to and made a part of this Bill of Exceptions.

Defendant's Exhibit No. 42



[fol. 451] Direct examination.

Continued by Mr. Hamer:

3501 Q. Mr. Estes, in your capacity as general yard master did you confer with Mr. Ellis while he was in the hospital?

A. Yes, sir, I did.

3502 Q. Did you ask Mr. Ellis how this accident occurred?

A. Yes, I did.

3503 Q. Did he discuss it with you?

A. Well, he just made a few—(interrupted).

3504 Q. No, just answer the question yes or no.

A. Yes.

3505 Q. Did you learn from your discussion with him what his view of it was?

A. Well, he said that—(interrupted).

3506 Q. No, did you learn?

A. Yes, I did.

3507 Q. After you discussed with him the circumstances in connection with this accident, did you prepare a statement in written form?

A. Yes, I did.

3508 Q. Handing you what has been marked here as Exhibit number 10, let me ask you if that is the statement which you prepared after talking with Mr. Ellis?

A. That is it.

3509 Q. And did you prepare that statement,—write it up yourself,—or did you dictate it to someone?

A. I dictated it to my chief clerk, and he typed it up.

3510 Q. Did you in dictating it endeavor to dictate the statement in narrative form as you had been given it by Mr. Ellis, that is, in substance?

[fol. 452] A. I tried to make the statement just as he told it to me.

3511 Q. Did you at a later time then return to the Providence Hospital with that statement?

A. Yes, I did.

3512 Q. What, if anything, was done with it on that occasion?

A. I showed it to Mr. Ellis and let him read it, and told him if it was all right, he could sign the statement.

3513 Q. Did he sign it?

A. He did.

3514 Q. In your presence?

A. He did.

3515 Q. Has there been any change made in that statement in any way from the time he signed it, and as you see it right now, except for the reporter's identification number?

A. No changes at all.

3516 Q. I notice on this statement, Mr. Estes, that wherever the figure "5" appears, it either appears in pencil or ink. Do you know how to account for that?

A. We haven't any "5" on our typewriter.

3517 Q. In the yard office?

A. That is right.

3518 Q. So every time you have to write the figure "5" it has to be done with pencil or ink?

A. Yes, sir.

3519 Q. I notice this statement is headed "Statement of Newton W. Ellis in regard to personal injury to himself, April 15th, 1943". Do you know how to account for that?

A. Well, it is just a mistake in the date.

[fol. 453] 3520 Q. I note that the statement itself is not dated. Do you know the approximate time you took it out to the hospital to Mr. Ellis and he signed it?

A. I don't remember the date.

3521 Q. Do you remember whether it was in March or April?

A. It was in March.

3522 Q. It was in March?

A. Yes, sir.

3523 Q. Now Mr. Estes, did you later return to the scene of this accident with a claim agent named Mr. Peterson?

A. Yes, sir, I did.

3524 Q. Do you remember when that was?

A. That was on December 3rd.

3525 Q. 1943?

A. 1943, yes.

3526 Q. And were there some other pictures taken on that date by Mr. Peterson, in your presence?

A. Yes, there were.

3527 Q. Handing you what has been identified here as Exhibit number 43, let me ask you if that is a picture that was taken in your presence by Mr. Peterson on December 3, 1943?

A. Yes, sir, it is.

3528 Q. I notice that there is a man appearing in this picture. Do you know who that is?

A. That is a picture of myself.

3529 Q. And where were you standing with reference to the wall or side of the Casein Building when that picture was taken?

A. I was standing at the exact spot where Mr. Ellis was injured.

3530 Q. How do you determine that?

[fol. 454] A. By the dents in the wall of the building.

3531 Q. Are you standing up against one of those dents?

A. Yes, sir, I am.

3532 Q. Let me ask if you know definitely, Mr. Estes, where the camera was at the time that this picture, Exhibit number 43 was taken? Do you know?

A. The camera was setting just east of the track, about eighteen inches from the rail, at the edge of the pavement.

3533 Q. The edge of the pavement on Myrtle Street?

A. Yes, sir.

3534 Q. That is where the camera was?

A. Yes, sir.

3535 Q. Now Mr. Estes, I notice in the background in this picture, a box car. Is that car the same car that was shown in these other pictures?

A. No, sir, that is a different car.

3536 Q. Do you know whether the car shown in this picture, Exhibit number 43, is a car spotted at the first loading dock of the Casein Company Building?

A. Well, I think it is, yes.

3537 Q. That is just a car that happened to be there at that time?

A. Well, I am not sure about that.

3538 Q. Well, it wasn't a car that you had moved there for any purpose, was it?

A. No.

3539 Mr. Hamer: Defendant offers in evidence its Exhibit number 43.

Mr. Tautges: No objection.

[fol. 455] Defendant's Exhibit Number 43 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

3540 Q. Now where there some other pictures taken in your presence by Mr. Thomas on December 3, 1943, within just a minute or within a few minutes of the time that Exhibit number 43 was taken?

A. Yes, by Mr. Peterson.

3541 Q. I mean Mr. Peterson.

A. Yes, sir.

3542 Q. Handing you what has been heretofore marked as Exhibit number 11, is that one of the pictures that Mr. Peterson took on December 3, 1943?

A. Yes, sir, it is.

3543 Q. Handing you what has been marked by the reporter as defendant's Exhibit number 44, I will ask you to state if that is a picture taken by Mr. Peterson, in your presence, on December 3, 1943, within the matter of a few minutes of the time that Exhibits numbers 11 and 43 were taken?

A. Yes, it is.

3544 Q. And is there shown in this picture, Exhibit number 44, the same box car that is shown in these other exhibits?

A. Yes, the same car.

3545 Q. That is in the other exhibits, numbers 11 and 43?

A. Yes, sir.

3546 Q. You mentioned a moment ago, Mr. Estes, at the time Exhibit number 43 was taken, you mentioned some indentations.

A. Yes, sir.

3547 Q. Are those the indentations appearing in the picture, Exhibit number 44?

A. Yes, sir, they are.

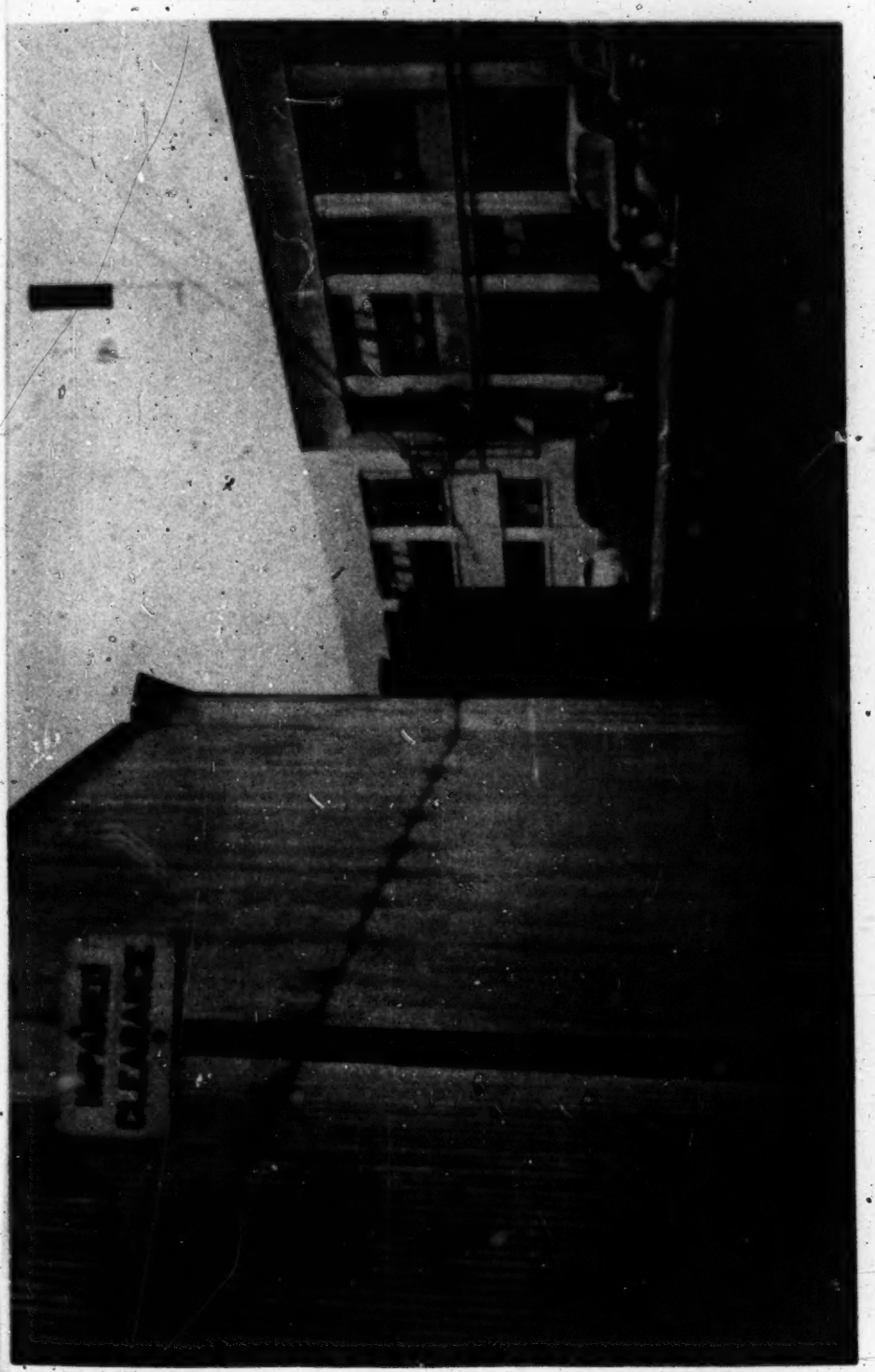
[fol. 456] 3548 Mr. Hamer: Defendant offers in evidence its Exhibit number 44.

Mr. Tautges: No objection.

Defendant's Exhibit Number 44 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follow 2 photolithographs, side folios 456a, 457)

Defendant's Exhibit No. 43



Defendant's Exhibit No. 44

[fol. 458] 3549 Mr. Hamer: Defendant offers in evidence its Exhibit number 10.

Mr. Tautges: No objection to Exhibit number 10.

Mr. Hamer: This Exhibit number 10 was identified by this witness, and was heretofore identified by Mr. Ellis as containing his signature.

Defendant's Exhibit number 10 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

DEFENDANT'S EXHIBIT No. 10

Statement of Newton W. Ellis in regard to personal injury to himself April 15th, 1943 at 7:00 pm at Casein Spur, East Marginal Way—Seattle

We were switching Casein Mfg. Co., there were two cars on the spur the south car was a load for the GN. We reached in on the spur and pulled out the two cars set the GN car out on the lead and were shoving back in with RI 364056 to spot this car at Door 1, JC Brown was at Door 1 to spot the car. I walked in between the building and the car and was up along near the front end of the car which would be the south end of the car and I wa-ked along in this position until we reached point of about fifty feet from Myrtle Street when I discovered that I would be out of sight of the engineer and also the switchman that was at Door 1 to spot the car, I stopped for a few seconds thinking that I could get into a better position to pass signals not realizing that this was a fifty foot car and that the clearance was so close. And when I stopped the middle of the car caught me between the car and the building and I remembe r rolling around in a different position and that is the last thing I remember until I became conscious in the ambulance on the way to the hospital which I suppose was about thirty minutes after the accident happened. I understand that there is an impaired clearance sign located between corner of building and Myrtle Street but I can't recall of noticing that sign before I was injured.

Newton W. Ellis.

[fol. 459] 3550 Q. Mr. Estes, will you step down and examine the plat, Exhibit number 1, in connection with the next questions that I have in mind asking you with respect to whether it would be necessary for the foreman or an-

other member of the crew to work between the spur track and the building with respect to respotting the car at the first loading dock of the Casein Company, as is shown upon the plat. Will you state whether or not it is necessary for the foreman or other members of the crew to work on the east side of the track, between the track and the building for any purpose?

Mr. Tautges: I think that is objected to as calling for a conclusion.

The Court: Sustained.

Defendant excepts.

3551 Q. Handing you what has been previously marked as Exhibit number 20A, will you state what type of record that is?

A. That is a record of loads and empties pulled out of industries, and is used also for an inter-charge record.

3552 Q. Did you make records of that same type when you were in the train service?

A. I did.

3553 Q. Were you an engine foreman at one time?

A. Yes, sir, I was.

3554 Q. Has the making of those records by engine foreman been a part of the duties of an engine foreman for the last ten years, that you know of?

A. Yes, sir.

3555 Q. And are such records made by engine foremen in the usual course of their duties?

[fol. 460] A. Yes, sir.

3556 Q. What is done with them after they are so made by the foreman of the switching crew?

A. We have a box in the yard office, with a lock on it. The foreman drops them in at the top, in a slot, and they are taken out every morning about seven o'clock and sent to the agent's office by messenger.

3557 Q. You will observe that on Exhibit number 20A there are some writings in ink and some check marks. Explain how that would occur.

A. When the foreman makes these records they are made out in the open, in all kinds of weather or rain, and sometimes they are not very plain. The numbers are designations of cars and the clerk checking these quite often takes pen and ink and re-checks them in pen and ink, so as to make them plain.

3558 Q. Do you know of your own knowledge, Mr. Estes, whether there was on the 8th or 9th day of August, 1942, a man employed either as a regular or acting foreman, by the name of Olsen?

A. Yes, there was.

3559 Q. And is Exhibit number 20A a record which shows that the foreman was Olsen, and the helpers Ellis and Jones?

A. Yes, sir, it does.

3560 Q. Is this book, of which Exhibit No. 20A is one sheet of many, part of the records of the Union Pacific Railroad Company, made and kept in the ordinary course of business?

A. Yes, sir, it is.

3561 Mr. Hamer: Defendant offers in evidence Exhibit number 20A, and asks leave to substitute photostatic copy. [fol. 461] Mr. Tautges: No objection.

Defendant's Exhibit No. 20A, having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

(Here follows 1 photolithograph, side folio 461a)

Defendant's Exhibit No. 20A

Form 2653

Station _____ Date _____ 19____

Engine No. _____ Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set

461a

[fol. 462] 3562 Q. Handing you what has been marked Exhibit number 45, I will ask you to state if that is another one of these industrial records which are made and kept in the usual course of business of the Union Pacific Railroad Company?

A. Yes, it is.

3563 Q. And is that another record showing that it was made by foreman Olsen?

A. Yes, it is.

3564 Q. And the helpers are shown as Ellis and Peterson?

A. That is right.

3565 Mr. Hamer: Defendant offers in evidence its Exhibit number 45, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: What is the date of that?

Mr. Hamer: 8-13-42. The time at Casein was 4:10 P. M.

Mr. Tautges: There is no objection.

Defendant's Exhibit Number 45 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

3566 Q. Handing you what has been marked Exhibit number 46, I will ask you to state if that is a sheet of the regular switching records, which are made and kept in the ordinary course of business of the Union Pacific Railroad Company, and were so made and kept in August, 1942?

A. Yes, sir, it is.

3567 Q. And Exhibit number 46 is one of the sheets made out for the crew of which Olsen was foreman?

[fol. 463] A. Yes, sir.

3568 Q. And the helpers were Ellis and Jones?

A. Yes, sir.

3569 Mr. Hamer: Defendant offers in evidence its Exhibit number 46, and asks leave to substitute a photostatic copy for the record.

Mr. Tautges: What is the date?

Mr. Hamer: 8-15-42, time at Casein 4:20 P. M.

Mr. Tautges: No objection.

Defendant's Exhibit Number 46 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

3570 Q. Handing you, Mr. Estes, what has been marked by the reporter as Exhibit number 47, I will ask you to state if that is another one of these industrial records made and kept in the ordinary course of business of the Union Pacific Railroad Company?

A. Yes, sir, it is.

3571 Q. Now do you know, Mr. Estes, whether there was employed by the Union Pacific Railroad Company, in the month of September, on September 16, 1942, a foreman or acting foreman named Munro?

A. Yes, there was.

3572 Q. And are the helpers shown on Exhibit number 47 Ellis and Maki?

A. That is right.

3573 Mr. Hamer: Defendant offers in evidence its Exhibit number 47, and asks leave to substitute photostatic copy.

Mr. Tautges: What are the dates?

Mr. Hamer: September 16, 1942.

[fol. 464] Mr. Tautges: No objection.

Defendant's Exhibit Number 47 having been offered in evidence and received without objection, same is attached to and made a part of this Bill of Exceptions.

Mr. Hamer: You may cross examine.

(Here follow 3 photolithographs, side folios 464a, 465, 466)

Defendant's Exhibit No. 45

Form 2553

Station _____ Date _____ 19__

Engine No. 101 Foreman _____

Helpers _____

CAR Initial	CAR Number	Load or Empty	Loaded or Empty	TAKEN From	TAKEN To	Time Set

464a

Defendant's Exhibit No. 46

Form 2853

Station _____ Date _____ 19__

Engine No. 1013 Foreman _____

Helpers _____

CAR Initial	CAR Number	Kind	Ld or Mty	TAKEN From	TAKEN To	Time Set
	178			NP		
UP	18428					
	1891					
	1897					
NP	49				NP	
	5946					
NAT	1092	T	X			
ACL	55645	A		Wes-Mat		
NP	54305		X	Fed-Pipe	NP	
SouL	64895			McMeans-Y		
NP	30228	B	X	K-CO	Wtl	
CBQ	165153			Hartwell		
SP	29322	B	X	N.W.		
Un	75963			Ga Vil	NP	
Rdg	20826			P Jct	NP	
Sou	45501	B	X	W-C		
Un	42747	B		W-Con		
SP	94131				NP	

Defendant's Exhibit No. 47

Form 2653

Station _____ Date _____ 19

Engine No. _____ Foreman _____

Helpers _____

CAR		Size	Ld or Mty	TAKEN		Time Set
Initial	Number			From	To	

[fol. 467] Cross-examination.

By Mr. Tautges:

3574 Q. Mr. Estes, this Exhibit number 10, which you say is a typewritten statement that you prepared, and which you had Mr. Ellis sign, you don't remember just when that was, do you?

A. No, it was possibly ten days or two weeks after the accident,—something like that. I am not sure of the exact date.

3575 Q. Is that the time that you had him sign it?

A. Yes, sir.

3576 Q. At that time he was still quite a sick man, was he not?

A. Yes, he was.

3577 Q. He says in this statement, as written by you, "I understand that there is an impaired clearance sign located between corner of building and Myrtle Street, but I can't recall of noticing that sign before I was injured." Did you ask him when, where and how he got the understanding that there was an impaired clearance sign there?

A. No, I don't recall that I did, no.

3578 Q. When your deposition was taken in Seattle last March, you didn't testify at that time did you that the first thing you did when you got to the scene of the accident was to look to see if there was an impaired clearance sign there?

A. I am not sure about that, if I did or not. I know when I did go to the accident, that was one of the first things I looked for.

3579 Q. But you are not sure whether the first thing you did was to look for an impaired clearance sign or not, are you?

A. Oh, yes, I am quite sure of that.

3580 Q. What?

A. Yes, sir, I am sure of that.

[fol. 468] 3581 Q. Had you, yourself, worked in on that Casein Spur track as a switch foreman?

A. Yes, sir.

3582 Q. And as a switchman?

A. Yes, sir.

3583 Q. Over what period of time did you work in there?

A. Oh, several years before I was appointed general yard master.

3584 Q. Do you remember how many years before?

A. No, I don't have the exact dates. There were different times.

3585 Q. Do you remember that that Casein Building at one time burned up and was reconstructed?

A. Yes, sir, I do.

3586 Q. And when that building was reconstructed the northwest corner was cut off so as to form different angles, was it not?

A. Well, I am not sure about that. I wasn't in Seattle at that time.

3587 Q. Well do you remember whether or not that was a square corner at one time, when you were working in there?

A. I don't remember whether it was or not.

3588 Q. You don't remember one way or the other?

A. No.

3589 Q. Do you remember when that fire occurred?

A. No, I do not.

3590 Q. Do you, yourself, have anything to do with the setting in and erecting of impaired clearance signs?

A. No, I haven't.

3591 Q. What department of the railroad company would know about that?

A. The Maintenance of Way Department.

3592 Q. Who has charge of that?

[fol. 469] A. The roadmaster.

3593 Q. When a sign is replaced, who actually does that work?

A. The men under the roadmaster, the section men.

3594 Q. That would be the section crew?

A. Yes, sir.

3595 Q. I suppose that when those signs are replaced or put in, there is some sort of record made of them, isn't there?

A. I presume there is. I am not sure about that.

3596 Q. Mr. Estes, calling your attention to Exhibit number 11, and looking at the track and toward the box car shown in the picture, that picture does show part of an old frog does it not?

A. Yes, it does.

3597 Q. And is that what you would call a number 5 frog?

A. I am not familiar with the size of them. I wouldn't know.

3598 Q. As I recall it,—I might be mistaken about this, but I was under the impression that at the time you testified in Seattle you had forgotten, or didn't remember that there was any frog in there. Is that correct?

A. That is correct. I looked afterwards and found there was one there.

Mr. Tautges: I think that is all.

Mr. Hamer: That is all.

Witness excused.

The Court: We will take a short recess.

(Following recess hearing of the above entitled cause was resumed as follows):

Mr. Hamer: Defendant rests.

[fol. 470] Mr. Tautges: At this time, Your Honor, the plaintiff also rests.

Mr. Hamer: May the Jury be excused from the room, Your Honor. I desire to make a motion.

The Court: The Jury will be excused for a while.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

3599 Mr. Hamer: Comes now the defendant, after plaintiff has annnounced his rest at the conclusion of all of the testimony, and moves the Court to dismiss the Jury and enter judgment in favor of the defendant, or in the alternative, to instruct the Jury to return a verdict in favor of the defendant, for the following reasons:

1. That under all of the evidence the plaintiff is not entitled to judgment.

2. That there is a total failure of any sufficient evidence to establish any negligence upon the part of the defendant.

3. There is a failure of proof with respect to the establishment of any negligence upon the part of the defendant as the proximate cause of any injuries sustained by the plaintiff.

4. For the reason that the evidence conclusively establishes that the plaintiff was guilty of contributory negligence which was the sole proximate cause of any injury or damage sustained by the plaintiff.

5. For the reason that the evidence affirmatively establishes that plaintiff had been warned that clearance was impaired between the Casein Building and the Casein Spur

track, by the presence of a sign located between said track [fols. 471-2] and said building, and near the northwest corner of the building, which is now affirmatively established by the evidence.

6. For the reason that negligence upon the part of the defendant cannot be predicated upon the distance which existed between the Casein Spur track and the Casein Building, and same being matters which involve questions of engineering and which are not for determination by courts and juries.

7. For the reason that there is a total failure of any proof that the tracks were improperly or negligently located or maintained, such proof not being established from the mere condition which existed.

8. For the further reason that there is no evidence to support any of the allegations of negligence set forth in the plaintiff's petition.

3600 (Argument by counsel on motion as stated above).

The Court: I will overrule the motion.

Defendant excepts.

The Court: We will adjourn until nine o'clock Monday morning for argument of the case to the Jury.

(Court reconvened at 9:00 A. M., May 15, 1944, and argument was made to the Jury by counsel for plaintiff and defendant).

[fol. 473] IN THE SUPREME COURT OF NEBRASKA

31889

ELLIS v. UNION PACIFIC R. R. CO.

OPINION—Filed July 20, 1945

1. A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.

2. In the law of negligence the last clear chance doctrine or rule is that, notwithstanding the negligence of a plaintiff,

if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care.

3. Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the accident, for the doctrine presupposes time for action.

4. In the absence of proof of opportunity to avoid injuring a person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the last clear chance doctrine.

[fol. 474] 5. A plaintiff will not be permitted to recover under the last clear chance doctrine if he, being in a perilous situation negligently created by himself, had the last clear chance to escape and neglected to do so up to the time of the accident.

6. The doctrine of last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the time of the accident, and thus contributed to cause the accident.

7. In an action for damages for personal injuries under the Federal Employers' Liability Act where an employer has failed to provide and maintain for an employee a reasonably safe place to work and in consequence and as the proximate cause thereof such employee receives injuries, the employer is required to respond in damages for negligence.

8. The requirement of the Federal Employers' Liability Act that an employer shall furnish employees with a reasonably safe place to work means a reasonably safe place within which they are required to work.

9. Where an employer furnishes to an employee two [fol. 475] places to work, one obviously to the employee safe and the other obviously unsafe, with the place of working left to the choice of the employee and he chooses the latter and is injured, the employer cannot be held negligent for failure to furnish a reasonably safe place to work.

10. Where an employee has placed himself in a situation of danger and seeks to avoid the consequences thereof the burden is on him to adduce evidence from which a reasonable inference can be drawn that in the exercise of reason-

able care he did not or could not have known of his danger. [fol. 476] Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell and Wenke, JJ.

YEAGER, J.

This is an action at law for damages for personal injuries by Newton W. Ellis, plaintiff and appellee, against the Union Pacific Railroad Company, a corporation, defendant and appellant, under the Federal Employers' Liability Act. The case was tried to a jury and a verdict was returned in favor of plaintiff for $10,000. Judgment was entered on the verdict. Motion for new trial was duly filed and by the court overruled. The defendant has appealed from the judgment and the order overruling the motion for a new trial.

On March 15, 1943, plaintiff was employed by the defendant as an engine foreman in charge of a switching crew on the tracks and in the switching yards of defendant at Seattle, Washington, more particularly known as "Argo Yards." As such engine foreman he was in charge of the engineer, fireman and the switchmen and operations were under his immediate control and direction. On the day in question plaintiff began his duties at 4 o'clock p. m. The first work was done a mile or more from the scene of the accident. At some time after going on duty plaintiff received instructions from proper authority to pick up a loaded car at what is known as the Casein Plant. He proceeded with his engine and crew to the vicinity of a switch [fol. 477] from which a spur track lead to the Casein Plant where the engine was stopped. The engine was headed at that time in an easterly direction. The Casein Plant was to the south and the track from the switch to it lead off southwest and then curved to the left around the west side of the building so that at the loading platform the track extended generally north and south. There was a curve in a part of the building to, in part, accommodate or compensate for the curve in the track. Investigation by plaintiff disclosed that there were two cars along side of the Casein Plant and that it was the more distant or the southernmost that was to be removed. On plaintiff's signal the engine backed on [illegible] spur and was coupled to the first car and then the two [illegible]re coupled together whereupon the two cars were removed from the spur and the second detached by

plaintiff. Thereafter the switch was lined and the first car was returned or backed into the Casein Plant spur to be spotted along side of the Casein Plant loading platform. At the time, plaintiff was on the ground and had proceeded toward the Casein Plant. He was, at the time of the accident, on the east side of the track and between it and the Casein Plant building. The car came around the curve and plaintiff was caught between it and the building on account of the narrow clearance between the car and the building at that point. He was injured in consequence of being so caught.

The plaintiff predicated his cause of action on negligence [fol. 478] on the part of the defendant. The grounds of negligence alleged and necessary to be mentioned herein were: (1) That defendant failed to provide and maintain for plaintiff a reasonably safe place to work, and negligently failed to provide and maintain adequate, sufficient and safe clearance between the track upon which defendant moved its engine and cars and the said Casein Plant building; (2) that the car which came in contact with the plaintiff was too large to safely move on the spur track; (3) that the defendant failed to maintain the spur track in a reasonably safe condition and permitted it to become rough, uneven and unstable and permitted low joints to exist to such an extent as to cause the car in question, while in motion, to list, sway, pitch and lurch in the direction of the building, thereby reducing the clearance between the side of the car and the building; (4) that the defendant moved the car toward and past the building at a dangerous and excessive rate of speed; (5) and that defendant failed to exercise reasonable care for the safety of plaintiff by failing to keep a proper lookout and by negligently failing to warn plaintiff of the danger to which he was subjected while in a position he was necessarily occupying while engaging in switching operations. There was no effort made to sustain the remaining specific charges of negligence.

In its answer the defendant admitted that plaintiff was injured but denied that it was guilty of any negligence. [fol. 479] Affirmatively it alleged that the accident and injuries to plaintiff resulted solely and proximately from the carelessness, recklessness and negligence of the plaintiff.

This allegation of negligence by the defendant was denied in a reply by the plaintiff.

As grounds for reversal of the judgment the defendant has set forth in its brief numerous assignments of error. The first five challenge the sufficiency of the evidence, in fact and in law, to permit the submission of the issue or issues made by the pleadings to a jury, or to sustain a verdict thereon in favor of the plaintiff. It therefore becomes necessary to review the evidence pertinent to the allegations of negligence set forth and the assignments of error and to analyze it in the light of applicable legal principles.

For the purposes of this review and analysis and in the light of the contentions of the defendant in this respect we proceed with a full recognition of the well established legal principle that the court must resolve in favor of the plaintiff all factual questions upon which there is a substantial conflict in the evidence. Those questions were for the jury under proper instructions. The rule as stated in the case of Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175, is as follows: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on [fol. 480] behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

From the record it appears that at the time of the accident plaintiff was 42 years of age. He was first employed by the defendant in April, 1942, and continued in its employ until March 15, 1943, the date of the accident. He was employed as brakeman and switchman until February, 1943, when he was promoted to the position of engine foreman. He was not always in charge of the same crew or the same engine. His usual assignment did not include the Casein Plant spur. There is a sharp conflict in the evidence on the question of whether or not he had ever participated in switching on this spur until the incidents involved here occurred. His testimony is that he was unfamiliar with the width of the clearance between the spur track and the Casein Plant buildings. During the afternoon he received an order from the yardmaster to remove a loaded car from the spur. About 7 o'clock p. m. with his crew he went to the switch leading into the spur and found thereon two cars, one loaded and one empty. The loaded car was removed after which, under his direction, the empty car was being

returned to be spotted to the west and opposite the Casein Plant loading platform. The engineer was backing the car on the spur and receiving his signals for movement from [fol. 481] plaintiff. Just before the accident occurred plaintiff was on the east side of the track and between the car and the building. A brakeman was farther south for the purpose of passing signals to plaintiff to be passed on by him to the engineer the purpose of all of which was to spot the empty car opposite the loading platform. According to plaintiff's testimony the brakeman passed from view on account of the curvature of the building, whereupon plaintiff turned and walked a few feet south. The car continued in the same direction and in consequence of the narrow space between the track and the building he was caught between the center of the car and the building. That he was caught because there was not sufficient clearance at that point is not questioned. As soon as the engineer saw the predicament he stopped the engine. He stopped it in the distance of 12 or 14 inches. Help responded at once from the crew but it was impossible to release plaintiff without movement of the car. The engineer pulled forward a few inches and plaintiff was extricated from his position. In the performance of his work and the control of the train it was proper for the plaintiff to be on the right side. A proper place also was on the opposite side. In the present instance it was less convenient to be on the left side in view of the curvature of the track and the fact that the engineer to whom signals were required to be transmitted was on the right side. The area to the west or left side was open and on that side there was no impaired clearance. [fol. 482] Some distance to the north or northwest and between the building and the spur track there was a standard of undetermined height, but probably six or seven feet high, on which was a sign facing outward from the building bearing in large type the words "Impaired Clearance." Plaintiff said that he had not seen this sign and there is no evidence to the contrary. It was in plain view. By inference plaintiff suggests that the sign was put in position after the accident but there is no evidence warranting the inference. During all of the time involved it was still light and from meteorological reports it appears that the sun had not set. There was evidence that the car was large but none that its width exceeded the width of cars in general use or that cars of its length were not standard.

We pass from this brief review of the evidence to elements of negligence charged and will first consider the charge that the car was moved at a dangerous and excessive rate of speed.

The evidence clearly indicates that the car was being operated at a very low rate of speed, in fact at such a low rate that the engineer, as hereinbefore pointed out, was able to stop it in the distance of 12 or 14 inches. There is nothing in the record from which a reasonable inference could be drawn that speed was in any wise a factor in the happening of the accident.

[fol. 483] The next charge of negligence which will be considered is the allegation that the defendant failed to exercise reasonable care for the safety of plaintiff by failing to keep a proper lookout and in failing to warn him of his danger. Under the theory on which the case was tried the substance of the charge is that the engineer failed to keep a proper lookout and failed to warn plaintiff of his danger. The theory of plaintiff under this charge is that he has a right of recovery under "the last clear chance" doctrine.

The evidence is clear that the engineer did not observe the danger to plaintiff and of course did not warn him. The evidence is also clear that the engineer was not in a position to better observe the danger to plaintiff than plaintiff was himself. In fact he was the length of a part of the car, the length of the tender and the distance from the tender to his position in the cab farther from the point of danger than was plaintiff and also he was operating his engine under the direction of the plaintiff.

Black's Law Dictionary (3d ed.) p. 1071, defines the last clear chance doctrine generally as follows: "In the law of negligence, this term denotes the doctrine or rule that, notwithstanding the negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care." See Styles v. Receivers of Richmond & D. R. Co., 118 N. C. [fol. 484] 1084, 24 S. E. 740; McLamb v. The Wilmington & W. R. Co., 122 N. C. 862, 29 S. E. 894. This general rule has received restrictions and explanations at the hands of the courts when it has become necessary to apply it. One such restriction is that before the doctrine can apply there must be opportunity to avoid.

On this restriction this court has said: "Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action." Diehm v. Dargacewski 135 Neb. 251, 280 N. W. 898; Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338. It was also said: "In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the 'last clear chance' doctrine." Johnston v. Delano, 100 Neb. 192, 158 N. W. 1034; Moses v. Mitchell, supra.

Another restriction approved by this court is that if a plaintiff is found to have been in a perilous position negligently created by himself and he had the last clear chance to escape and neglected to do so up to the time of the accident the doctrine can have no application. On this proposition in Long v. Guilliatt, 137 Neb. 199, 288 N. W. 689, it was said: "It would be exacting too much of the law to permit plaintiff to recover, if, in a perilous situation negligently created by himself, he had the last clear chance to escape and neglected to do so up to the very instant of the acci- [fol. 485] dent."

Still another restriction placed upon the rule by this court is the following: "The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident." Hughes v. Omaha & C. B. Street Ry. Co., 143 Neb. 47, 8 N. W. 2d 509; Donald v. Heller, 143 Neb. 600, 10 N. W. 2d 447.

These restrictions of the Nebraska decisions upon the doctrine find support in other jurisdictions including the federal courts. See Soles v. Atlantic C.L.R. Co., 184 N. C. 283, 114 S. E. 305; Newport News & M. V. Co. v. Howe, 6th Cir., 52 Fed. 362, 3 C.C.A. 121; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 S. Ct. 653; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 S. Ct. 679; Southern Ry. Co. v. Gray, 241 U. S. 333, 36 S. Ct. 558; Marshall v. Hines, 8th Cir., 271 Fed. 165; Miller v. Union P. R. Co., 8th Cir., 63 F. 2d 574; St. Louis S. W. Ry. Co. v. Simpson, 286 U. S. 346, 52 S. Ct. 520.

It cannot be said under the evidence in this case that the engineer had an opportunity to avoid the accident after he

observed or in the exercise of ordinary care should have observed the danger to plaintiff. Under the evidence it is clear that in the exercise of ordinary care the plaintiff had at least an equal opportunity with defendant's engineer to observe his danger, thus if the engineer was negligent so [fol. 486] also was plaintiff contemporaneously negligent right up to the time of the accident. Therefore, assuming that the engineer was negligent, the contemporaneous negligence of plaintiff would defeat a recovery under the last clear chance doctrine.

On the other hand if it be contended that plaintiff was not negligent it cannot be reasonably contended under the evidence that the engineer was negligent. He testified, on behalf of plaintiff, that he did not perceive plaintiff's danger and the evidence indisputably shows that he was not in any better position to observe than was plaintiff.

We must therefore hold that the plaintiff has failed to sustain by any competent evidence a right of recovery under the last clear chance doctrine.

Examination of the bill of exceptions discloses that the charge that the condition in which the spur track was maintained caused a reduced clearance between the car and the building is without support in the evidence. The only evidence bearing on this question is exactly to the contrary. The evidence is to the effect that in construction the elevation of the outer rail is probably above the inner, yet with the slow movement of the car at the time in question there was no listing, swaying, pitching or lurching in the direction of the building.

The remaining charge of negligence is that of whether [fol. 487] or not the accident was caused by the failure of defendant to provide and maintain for plaintiff a reasonably safe place to work. If there is competent evidence that it did so fail and in consequence and as the proximate cause thereof plaintiff received the injuries complained of or some of them he is entitled to recover, this being concededly an action under the Federal Employers' Liability Act (Title 45, U.S.C.A., sec. 51 et seq.).

The plaintiff contends that by the failure of defendant to have provided sufficient clearance between its spur track and the Casein Plant building at the point where he was caught it failed in its duty to provide for him a reasonably safe place to work within the meaning of the law. The de-

fendant on the other hand denies this and on its part asserts that plaintiff in placing himself in the position in which he received his injuries was guilty of negligence which was the proximate cause of those injuries.

A determination of this issue or these issues does not depend upon a resolution of disputed facts. It depends upon application of legal principles to a substantially undisputed set of facts.

There was not sufficient space within which to work at the point where plaintiff was hurt. As already pointed out plaintiff was in charge of the train crew and it was his duty to control the movements of the train. It was the duty of the engineer to control the movements under the direction [fol. 488] of plaintiff or the brakemen who were under plaintiff's control. Control was exercised in daylight by hand signals. Plaintiff was properly exercising control at the time of the accident. It was customary and usually more convenient to exercise control from the right than the left side and especially on a curve the inside of which was to the right, for the reason that it was easier to get signals to the engineer whose position is in the cab on the right side of the engine. It is also usual and customary and acceptable practice for trains to be controlled by the engine foreman and his brakemen from the opposite side by relay of signals, usually through the fireman, to the engineer, where convenience, safety or judgment requires. If the latter practice had been followed in this instance this accident could not have occurred, since on that side of the train there was no question of narrow clearance or obstruction.

On the question of negligence on the part of plaintiff warning or knowledge of the dangerous situation is a matter of importance. A warning of impaired clearance was appropriately placed by the carrier but plaintiff said he had not seen it and the effect of his testimony is that he was never in a proper position to see it. Also he said that he had never been in this vicinity and had no previous knowledge of the surroundings. For present purposes therefore it must be assumed that he had no previous warning of the [fol. 489] condition complained of and was chargeable with no knowledge or information in regard thereto except such as would flow from reasonable observation under the conditions and circumstances in the light of his knowledge and experience in the work in which he was engaged.

Whether or not defendant was negligent depends upon the question of whether or not under the recited facts and within the meaning of the law the defendant furnished plaintiff a reasonably safe place to work, assuming of course that plaintiff had no previous knowledge and was not warned of the impaired clearance between the track and the building.

As a condition to a finding of negligence against the defendant in this respect it must appear either that plaintiff was required to work in the position where he was injured, or that the surrounding conditions and circumstances coupled with his experience and the requirements of his employment were insufficient to reasonably apprise him of the danger of that position.

As already pointed out he was not required, in the performance of his service for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own.

The evidence of plaintiff must be accepted the effect of which is to say that he was not in fact aware of the danger. Was the danger then under the circumstances of such a [fol. 490] character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not the plaintiff was guilty of negligence which was the proximate cause of the accident.

The courts of other jurisdictions have spoken to this question in cases involving comparable states of facts under the Federal Employers' Liability Act. This court has passed on no case closely in point as to facts.

The first case to which we shall call attention having a similar state of facts is Haring v. Great Northern Ry. Co., 137 Wis. 367, 119 N. W. 325. In the opinion it was said: "Appellant claims that the position of the car on the curve of the track left an open space between the ends of the car and the edge of the platform, and that this would naturally invite employees to occupy this space and lead them to believe they were in a safe place, and that therefore such a construction rendered the appliance defective and unsafe. Nothing unusual or extraordinary results from a car passing over a curve in proximity to a platform. It is manifest

that this was an appropriate way of constructing the car and platform. The fact that the ends of the car in passing over the curve would be farther away from the platform than at the points between the ends is a natural condition which the deceased, as a reasonably intelligent person, must be presumed to know and note, and his omission to do so [fol. 491] was an act of negligence."

In Baltimore & O. R. Co. v. Newell, 3d Cir., 196 Fed. 866, a case similar in principle but not in fact, the court said: "Railroading is at best a somewhat dangerous employment, and requires and bespeaks reasonable prudence and care on the part of those employed in its conduct. Undoubtedly there are, in the general course of its business, specific places and situations in which employes are required to work, and there is a clear legal duty imposed upon the railroad company to keep these places safe for that purpose. The question, therefore, that arises in the case before us is, was the space between the edge of the freight platform and the body of a freight car a place within which the plaintiff was required to work, and therefore to be kept reasonably safe for that purpose by the defendant? We think not. On the contrary, it was a place from which employes were excluded by the obvious situation. * * * But it is not as to the platform as a place to work upon that the allegation of unsafety is made, but as to the space between the side of a freight car and the edge of a platform, in which no employe was required to work. Clearly the railroad company was not obliged, in considering the dimensions of that space, to provide for the safety of one who voluntarily placed himself therein."

In Stone v. Chicago & N. W. Ry. Co., 176 Minn. 104, 222 N. W. 641, which was a clearance case, the court said: "Plaintiff charged in her complaint that defendant negli- [fol. 492] gently failed to provide and maintain a safe and sufficient clearance between the track and the platform but does not urge that claim here. It would clearly be untenable. Defendant did not construct either track or platform and did not own or control either. The matter of constructing them and of locating them properly in relation to each other was an engineering problem. They were arranged for the purpose of bringing cars into a convenient position to be loaded from the platform. The plan did not intend a

space for employes between cars and platform, and there was no need for employes to be in the space between them."

This court in Sullivan v. Chicago & N. W. Ry. Co., 128 Neb. 92, 258 N. W. 38, a case not in point on the facts but in point on the question of obvious danger, said: "The defect upon which plaintiff relies to show negligence was not latent but obvious. * * * In an action by an employee against his employer, a railway company, under the federal employers' liability act, there is generally no liability for injuries from dangers that are obvious."

Other cases bearing on the question of injuries sustained by railroad employees in positions where it was not contemplated that they would be found and on the absence of negligence in situations where the danger is obvious are: Canadian Northern Ry. Co. v. Walker, 8th Cir., 172 Fed. 346; McCann v. Minneapolis & St. L. R. Co., 159 Minn. 70, [fol. 493] 198 N. W. 300; Lenz v. Union P. R. Co., 128 Neb. 99, 258 N. W. 33; Davis v. Hand, 8th Cir., 290 Fed. 73; Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215; Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. Ct. 202; Atlantic C. L. R. Co. v. Powe, 283 U. S. 401, 51 S. Ct. 498.

The cases thus far cited and quoted from favor the position contended for by the defendant. Plaintiff cites a number of cases which he asserts support the contention that negligence on the part of the defendant and also of the plaintiff under the evidence was one for the jury. The case most closely in point and most favorable to his position is Hemmingsen v. Chicago & N. W. Ry. Co., 134 Wis. 412, 114 N. W. 785.

Hemmingsen, an experienced brakeman, was working on the side of the track opposite a loading platform of irregular outline. He was ordered to cut off a car and immediately crossed the track in front of the cars where he was caught between a car and the platform. The court in the opinion adhered to the rule that where the danger was known or should have been known there could be no recovery but concluded in that case that the question was one for the jury. The opinion speculates at considerable length on reasons why Hemmingsen did not observe his danger and why it was not obvious to him but finally, in the following words, points to an inference from the evidence that he did not have sufficient time or opportunity to become apprised [fol. 494] of his danger and extricate himself therefrom:

"Now it may well be that he was caught before he had time to know the danger or extricate himself from it, if he did discover it, while in the perilous position."

Under the rule of the cases in this respect the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not or could not know of his danger.

We think his evidence is not subject to such an inference. It was daylight. He gave the signal for the movement, then not seeing the brakeman who was to give a signal for the spotting of the car he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught.

Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care the danger would have been obvious.

It follows therefore that, the plaintiff having failed to prove any of his charges of negligence, the court erred in [fols. 495-496] submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence which was the proximate cause of the accident, or to pass upon other errors assigned as grounds for reversal.

The judgment of the district court is reversed and the action dismissed.

Reversed and dismissed.

[fol. 497-1] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF—
Filed August 8, 1945

MOTION FOR REHEARING

Comes now the plaintiff and appellee, and respectfully asks the Supreme Court to set aside and vacate its decision and judgment of July 20, 1945, wherein the judgment for

plaintiff and appellee was reversed and the action dismissed, and to grant to plaintiff-appellee a rehearing of said cause because of manifest errors in the decision and judgment of the Supreme Court which deprives plaintiff-appellee of his right and remedy to recover damages under [fol. 497-2] the Federal Employers' Liability Act, as follows:

1. The opinion and decision of the Supreme Court is erroneous in that it mistakenly assumes that the evidence was insufficient to present an issue of fact for determination by the jury as to whether or not appellant was negligent in respect to any or either of the issues of negligence submitted to the jury by the trial Court.

2. The opinion and decision of the Supreme Court is erroneous and in conflict with the Federal Employers' Liability Act and the decisions of the United States Supreme Court in holding that *under the evidence the issue of appellant's negligence did not present a question of fact for determination by the jury.*

3. The opinion and decision of the Supreme Court is erroneous in holding that plaintiff-appellee tried his case on the theory of the "last clear chance doctrine" insofar as any negligence of appellant's engineer is concerned.

4. The opinion and decision of the Supreme Court is erroneous in holding that under the "doctrine of last clear chance" plaintiff-appellee is barred from recovering damages.

5. The opinion and decision of the Supreme Court is erroneous in holding that there was no evidence which would justify a jury in finding that appellant's engineer was guilty of negligence which was a proximate cause of the injuries sustained by plaintiff-appellee.

[fol. 497-3] 6. The opinion and decision of the Supreme Court is erroneous in holding that the evidence was insufficient to permit a finding by the jury that appellant was negligent in failing to provide and maintain for plaintiff-appellee a reasonably safe place of work.

7. The opinion and decision of the Supreme Court is erroneous in holding that the evidence was insufficient to permit a finding by the jury that appellant was negligent in failing to adequately or specifically warn plaintiff-appel-

lee of the danger to which he was exposed by reason of the lack of clearance between the side of the car and the Casein plant building.

8. The opinion and decision of the Supreme Court is erroneous in holding that "under the theory on which the case was tried, the substance of the charge is that the engineer failed to keep a proper look-out and failed to warn plaintiff of his danger" and in thus failing to take into consideration the evidence that appellant at no time gave either specific or timely warning or notice to plaintiff of the danger and hazard to which he was exposed at the place where the accident occurred.

9. The opinion and decision of the Supreme Court is erroneous in holding that "the evidence is clear that the engineer did not observe the danger to plaintiff" and in holding that "the evidence is also clear that the engineer was not in a position to better observe the danger to plaintiff than plaintiff was himself."

10. The Supreme Court was in error in holding that "it cannot be said under the evidence in this case that the engineer had an opportunity to avoid the accident if he ob- [fol. 497-4] served, or in the exercise of ordinary care, should have observed the danger to plaintiff."

11. The Supreme Court was in error in holding that "under the evidence it is clear that in the exercise of ordinary care the plaintiff had at least an equal opportunity with defendant's engineer to observe his danger, thus, if the engineer was negligent so also was plaintiff contemporaneously negligent right up to the time of the accident. Therefore, assuming that the engineer was negligent, the contemporaneous negligence of plaintiff would defeat a recovery under the last clear chance doctrine."

12. The opinion and decision of the Supreme Court is erroneous in holding in respect to the engineer "that he did not perceive plaintiff's danger and the evidence indisputably shows that he was not in any better position to observe than was plaintiff."

13. The decision of the Supreme Court and its opinion is erroneous in assuming that because there was a safe place of work on one side of the track, that appellant could not be held negligent in maintaining an unsafe place of work on the other side of the track, namely, the place where

plaintiff-appellee was injured between the side of the box car and the Casein plant building.

14. The decision and opinion of the Supreme Court is erroneous in holding that "the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not *or could not know of his danger*" (italics ours).

[fol. 497-5] 15. The decision and opinion of the Supreme Court is erroneous in that it is in conflict and not in harmony with decisions of the United States Supreme Court construing the Federal Employers' Liability Act as amended by an act of Congress on August 11, 1939.

16. The decision and opinion of the Supreme Court is erroneous in depriving plaintiff-appellee of any right to recover damages on the theory that plaintiff assumed the risk of his injuries. While the Court does not so state, that is the only practical deduction that can be arrived at from the reasoning of the Court, and the holding and conclusion of the Court, in fact, is equivalent to a holding that appellant cannot be held to be negligent because plaintiff assumed the risk.

17. The decision and holding of the Supreme Court is erroneous and in conflict with federal law in that in reversing the judgment of the lower Court and in dismissing the action, it is usurping the functions of the jury.

18. The opinion and decision of the Supreme Court is erroneous in that it fails to give to plaintiff the benefit of all inferences favorable to him from undisputed facts.

19. The opinion and decision of the Supreme Court is erroneous in holding "that the charge that the condition in which the spur track was maintained caused a reduced clearance between the car and the building is without support in the evidence."

20. The decision and opinion of the Supreme Court is erroneous in failing to recognize and hold that the failure [fol. 497-6] of defendant-appellant to bring home to plaintiff-appellee notice and warning of the dangerous situation because of lack of sufficient clearance between the track and the building at the point where plaintiff was injured was an element of negligence and was evidence of negligence sufficient to charge defendant with actionable negligence

and that such negligence was a proximate cause of plaintiff's injuries.

21. The decision and opinion of the Supreme Court is erroneous in holding that "as a condition to a finding of negligence against the defendant in this respect (failure to warn or provide a reasonably safe place of work) it must appear either that plaintiff was required to work in the position where he was injured, or that the surrounding conditions and circumstances, coupled with his experience and the requirements of his employment, were insufficient to reasonably apprise him of the danger of that position" (parenthesis ours).

22. The decision and opinion of the Supreme Court is erroneous in holding "as already pointed out, he was not required, in the performance of his service for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own."

The vice and impropriety of such a holding is that it ignores the fact that plaintiff was permitted to work in an unsafe place without notice or warning of the danger, and erroneously assumes that he made the choice with knowledge that one place was safe and the other was not.

[fol. 497-7] 23. The opinion and decision of the Supreme Court is erroneous in holding, after conceding that the evidence of the plaintiff must be accepted, that he was not, in fact, aware of the danger, "Was the danger, then, under the circumstances, of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not the plaintiff was guilty of negligence which was the proximate cause of the accident."

24. The decision and opinion of the Supreme Court is erroneous in holding as a matter of law as follows: "Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If, after turning about, he had paid any attention to his situation, the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care, the danger would have been obvious."

25. The decision and opinion of the Supreme Court is erroneous in holding that "it follows, therefore, that the plaintiff having failed to prove any of his charges of negligence, the court erred in submitting the case to a jury."

26. The decision and opinion of the Supreme Court is erroneous in holding that the danger of injury was obvious to plaintiff or could have been discovered by him and that this exonerates and relieves defendant of its negligence.

[fol. 497-8] Propositions of Law

I

This Being an Action at Law Under the Federal Employers' Liability Act, the Error or Correctness of the Rulings of the Supreme Court of Nebraska in Holding That Plaintiff-Appellee Did Not Establish a Case of Actionable Negligence and in Reversing and Dismissing His Action on Such Ground, Presents a Federal Question, Notwithstanding the Sufficiency of the Evidence to Establish Negligence Is Involved.

2 Roberts, Federal Liabilities of Carriers, 2d Ed., Sec. 821.

Brady v. Southern Railway Co., 320 U. S. 476, 479, 64 S. Ct. 232, 234.

Bimberg v. Northern Pacific R. Co., 14 N. W. (2d) p. 411, p. 413.

Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451.

Tennant v. Peoria & U. P. R. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 322.

II

Negligence May Be Established by Circumstantial Evidence as Well as by Direct Evidence; Negligence May Be Found on Facts Not in Dispute When Reasonable Minds May Arrive at Different Inferences From Such Undisputed Facts; It Is for the Jury, and Not the Court, to Judge the Weight and Credibility of the Evidence and Testimony and [fol. 497-9] to Determine What Facts Are Established Thereby.

Bimberg v. Northern Pacific R. Co., 14 N. W. (2d) p. 411, p. 413.

Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451.
Tennant v. Peoria & U. P. R. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 322.
Chicago, St. P., Mpls. & Omaha R. Co. v. Muldowney, 130 Fed. (2d) 871 (8 Cir.).
Lowden v. Burke, 129 Fed. (2d) 767 (8 Cir.).
Owens v. U. P. R. Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.
Jacob v. New York, 315 U. S. 752, 87 L. Ed. 1166, 62 S. Ct. 854.
Thompson v. Boles, 123 Fed. (2d) 487 (8 Cir.).
Sweet v. Michigan Central R. Co., 49 N. W. 882 (Mich.).
Hemmingsen v. C. & N. W. R. Co., 134 Wis. 412, 114 N. W. 785.
Koller v. Chicago, St. P., Mpls. & Omaha R. Co., 113 Minn. 173, 129 N. W. 220.

III

The Evidence Does Not Justify Judgment in Favor of Defendant Notwithstanding the Verdict of the Jury and the Court Was in Error in Holding That the Evidence Did Not Establish Actionable Negligence on the Part of Defendant.

[fol. 497-10]

IV

Plaintiff Cannot Be Defeated on the Theory That the "Last Clear Chance Doctrine" Applied to Him But Not to Defendant; the Court Erroneously Assumed That Plaintiff Tried His Case on the Theory of the "Last Clear Chance Doctrine" in His Effort to Establish Negligence on the Part of Defendant's Engineer; in an Action Under the Federal Employers' Liability Act, the Doctrine Is of no Consequence and Its Only Function and Useful Purpose to a Plaintiff in Such an Action as This May Be to Save a Reduction of Damages for His Contributory Negligence.

V

Under the Federal Employers' Liability Act, Absence of Negligence on the Part of Appellant Cannot Be Lawfully Found on Any Basis or Theory, However Disguised or Ob-

scured by Play of Words, Which in Effect and in Fact Invokes the Rule of Assumption of Risk.

Tiller v. Atlantic Coast Line R. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 322.

Chicago, G. W. R. Co. v. Peeler, 140 Fed. (2d) 865, 867 (8 Cir.).

VI

It Is Not Essential to a Finding of Negligence Against Defendant That Plaintiff Be Literally Required to Work in the Precise Place or Within the Limits Thereof Where He Met With Injury. The Determinative Factor Depends Upon Whether the Place Was One in Which Plaintiff Was Permitted to Work or Might Be Expected to Work in the [fol. 497-11] Performance of Duties of His Employment. The Word "Required" Is to Be Construed Practically and Liberally and Not in a Mandatory Sense.

Thompson v. Boles, 123 Fed. (2d) 48[illegible] (8 Cir.).

Outcelt v. C., B. & Q. R. Co., 150 Minn. 398, 185 N. W. 495, 497.

Brief in Support of Motion

Point I

On the Issues of Negligence, a Federal Question Is Presented

The law is so well settled as to this as to admit of no dispute. The rule is concisely stated in *Bimberg v. Northern Pacific R. Co., supra*, as follows:

> "This being an action under the Federal Employers' Liability Act, the correctness of these rulings (denial of defendant's motion for a directed verdict, and after a verdict for plaintiff, its motion for judgment notwithstanding the verdict) is a federal question, notwithstanding the sufficiency of the evidence to establish negligence is involved."
>
> 2 Roberts, Federal Liabilities of Carriers, 2d Ed., Sec. 821.

Points II to VI, Inclusive

The Substance of the Opinion and Decision of the Supreme Court Being Based Upon a Conclusion That Plain-

tiff-Appellee Failed to Establish Negligence Attributable to Defendant-Appellant, the Various Propositions of Law Will Be Discussed Under This General Heading in Furtherance of Brevity.

Numerous grounds of error have been set forth in the motion in the hope that they may clarify the grievous error [fol. 497-12] into which the Court has perhaps inadvertently fallen through an apparent misapprehension of the full force and effect of the 1939 amendment of the Federal Employers' Liability Act, whereby assumption of risk was abolished. It is believed by us that through misunderstanding, the Court has failed to take full and proper cognizance of the fact that practically all of the cases cited in the opinion in support of the Court's conclusion that there was a failure to establish negligence, have been rendered impotent as precedent and are not of controlling force, nor are they decisive on the issue of negligence in the case at bar. A careful study and consideration of the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451, cited and rather copiously quoted from in appellee's original brief, but not referred to in the Court's opinion, should make this clear. All of the cases cited by the Court as authority for the proposition that plaintiff did not establish negligence on the part of defendant in respect to providing and maintaining a safe place of work, because the Court concluded the danger was obvious and not latent, and that plaintiff could have discovered the danger, are cases that were decided prior to the 1939 amendment of the Federal Employers' Liability Act.

The Supreme Court of Nebraska has failed to take cognizance of the fact that the very purpose of the amendment was to prevent the very result that this Court has arrived at in this case, namely, that defendant was not negligent notwithstanding the place of work was unsafe, because the Court has concluded that the danger was obvious to plaintiff, or at least discoverable by him.

[fol. 497-13] In view of the fact that the Court in its opinion has not referred to or discussed the various recent decisions of the United States Supreme Court cited in appellee's original brief, and cited herein, all of which are cases arising since the amendment, naturally lead us to the conclusion that the Court failed to fully appreciate the force, effect and purport of those decisions which make it

clear that a plaintiff is not to be denied his remedy under the Federal Employers' Liability Act, as amended, on any narrow or technical grounds. It seems clear to us that this Court, in the result arrived at, has unwittingly done the very thing which was condemned by the United States Supreme Court in the Tiller case.

The error which this Court has fallen into and which other Courts have fallen into is perhaps best illustrated by the case of *Chicago, Great Western R. Co. v. Peeler,* 140 Fed. (2d) 865, 867 (8 Cir.).

(See Subdivision 3 of the opinion, wherein the Court in that case discusses certain cases cited by appellant in that case, such as *Nelson v. Southern Ry. Co.,* 246 U. S. 253, and *Missouri Pacific R. Co. v. Aeby,* 275 U. S. 426, and other cases.)

The *Aeby* case was one of the cases cited by appellant herein. The Court, speaking of those cases, said:

> "The cases are not in point herein. A defect which hinders a switchman in the performance of his duties, does 'impair safety in operation.' In the *Nelson* case, *supra,* the plaintiff was a civil engineer making a survey in the yards at the time he was injured by a defect in a tie. In the *Aeby* case, the plaintiff, a station agent, [fol. 497-14] was injured by stepping on ice recently formed in a depression on the platform. The court observed that plaintiff knew that it had rained and the place was covered with ice and snow; that her knowledge of the danger was equal to that of the company; and that she voluntarily took the risk of known conditions. *Under the circumstances, the court held that the carrier was not negligent.*" (Italics ours.)

The Court then further said of the *Aeby* case, quoting:

> "The case was decided before the adoption of the amendment of 1939 to the Federal Employers' Liability Act (hereinafter discussed) abolishing assumption of risk as a defense in cases brought under that Act, and the decision is clearly predicated upon that doctrine. The decision is not controlling in this case."

It affirmatively appears that the place where plaintiff-appellee was injured was an unsafe place in which to work. It further appears that notwithstanding the "impaired clear-

ance" sign, it was customary for the employees to work in the space between the Casein Spur track and the side of the Casein building. In fact, defendant's engineer, Buzard, testified that during his many years of experience on the Casein Spur track the men always worked on that side prior to the injury to plaintiff, and have continued to do so, except on or two occasions, since Ellis was injured (appellee's brief, p. 30; B. of E., pp. 354, 355; Qs. 2257, 2262).

It should be noted in connection with the impaired clearance sign that it was 8 to 9 feet above the ground and not probably 6 or 7 feet as stated by the Court in the opinion (see appellant's brief, p. 71; B. of E., p. 504; Qs. 3095-3097). [fol. 497-15] Also, that the sign was at least 30 to 40 feet from the place of accident (appellee's brief, p. 51).

Plaintiff had no knowledge of the dangerous insufficiency of clearance and did not know the degree of curvature of the track (B. of E., p. 15; Qs. 60, 61). While the Court in its opinion seems to concede that the place where Ellis was injured was a proper place to work, and, also, that it was an unsafe place of work, it fails to give due effect to the fact that plaintiff had not been effectively warned against the danger of injury and that defendant did not adopt any rule or issue any instructions prohibiting employees from working in that space. If defendant had properly placed and posted signs of "no clearance" or had it given plaintiff definite notice or warning of the danger, the accident, in all probability, would have been avoided. Assuming that the impaired clearance sign was in the position contended by appellant, it would mean, according to the testimony of Engineer Buzard, "under standard clearance" (appellee's brief, p. 28; B. of E., pp. 347-351; Qs. 2217-2243).

The notice, if any, furnished by the sign was altogether too indefinite and uncertain.

It is also an outstanding fact, not in dispute, that appellant at no time, either by rule or instruction, prohibited or cautioned its employees against working in that space where Ellis was injured. The only legitimate conclusion is that it adopted this space as a place of work and was in duty bound to maintain it in reasonably safe condition, or else to give adequate and sufficient warning to its employees of [fol. 497-16] the danger. Under the Federal Employers' Liability Act, as amended, it cannot escape liability from its negligence merely because the danger might have become

obvious to plaintiff, or might have been discoverable by him. Appellant is liable for the consequences of its negligence and plaintiff for his, but the fact that plaintiff may have been negligent does not in law whitewash defendant's negligence. We submit that there was ample evidence of negligence for determination by the jury of at least three issues: (1) Negligence of defendant in failing to provide and maintain a reasonably safe place of work; (2) Negligence of defendant in failing to adequately and sufficiently warn plaintiff of the danger; (3) Negligence of the engineer in proceeding with the movement when he knew, or in the exercise of ordinary care, ought to have known that plaintiff was in a position of peril.

The Court recognized the rule that plaintiff was "entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Whether or not by this statement, the Court also meant that plaintiff was entitled to the benefit of every inference in his favor as to undisputed facts which were susceptible of different inferences, we do not know. For that reason we specifically call the Court's attention to the cases cited under Proposition of Law No. 11, which contain the recent decisions of the United States Supreme Court since the 1939 amendment of the Federal Employers' Liability Act, and particularly, to *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; *Tiller v. Atlantic Coastline R. Co., supra,* and [fol. 497-17] *Jacob v. New York*, 315 U. S. 752, 87 L. Ed. 1166, 62 S. Ct. 854. While the Court apparently recognized the rule, it failed to give the plaintiff the full benefit thereof.

The case of *Sweet v. Michigan Central R. Co.*, 49 N. W. 882 (Mich.), is very much in point on the issue of defendant's negligence in failing to provide and maintain a reasonably safe place of work. This case has not heretofore been cited and just recently came to our attention. It was there held that defendant was negligent in maintaining a side track so close to a building so that the side of a car, in passing the building, came within 13 to 16 inches thereof. The Court said:

> "The negligence of the defendant is apparent, and does not seem to be disputed. It was the duty of the defendant to provide a safe place for the men to work in the yards. There is shown no excuse for the laying of

this track so close to the building. It was unsafe and dangerous. Indeed, the claim made by defendant's counsel is that it was so obviously unsafe that the plaintiff's intestate was presumed as a matter of law to have taken notice of it."

Recovery for plaintiff was sustained.

This case, and *Hemmingsen v. Chicago & N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785, cited in plaintiff's original brief, pages 42, 90, and referred to in the Court's opinion and decision are more nearly analogous to the facts in the case at bar than any case cited against the contentions of plaintiff, and are more in accord with the requirements of the Federal Employers' Liability Act, as amended in 1939. [fol. 497-18] See, also, case of *Koller v. Chicago, St. P., Mpls. & Omaha R. Co.*, 129 N. W. 220, 113 Minn. 173.

Negligence of Engineer

The Court is clearly in error in holding that the evidence did not show negligence on the part of the engineer. In so holding, the Court either overlooked or failed to give consideration to the following outstanding facts: The engineer had many years of experience both as an engineer and fireman in working in and out of the Casein Spur track; he knew of the existence of the impaired clearance sign, and it certainly should have meant as much to him as to plaintiff; plaintiff was a comparatively new man on the job; it was a duty on the part of the employees to exercise care for each other; particularly, did the engineer admit that it was his duty to keep in contact with plaintiff and to stop any movement if Ellis disappeared from sight (appellant's brief, p. 44; B. of E., pp. 346-357; Qs. 2211-2216).

The testimony of the engineer, with other facts and circumstances, was sufficient to permit the jury to draw an inference that he was negligent. He had a commanding view of the situation; he must have known that the clearance was narrow; he should have realized and appreciated that Ellis was unaware and unconscious of the danger; if Buzard was keeping the look-out which he says he was, he could not avoid seeing and knowing, if alert and attentive, that the car was likely to trap or pinch plaintiff. Ellis, in trying to keep in contact with the engineer, as well as the switchman, helper, and engrossed in his work, was unaware of and did

not appreciate that he was in a dangerous situation. The [fol. 497-19] situation of the engineer was entirely different. With his knowledge and experience and what he could and should have observed, he should have realized that plaintiff was likely to be injured unless the movement was stopped. It was negligent of the engineer to proceed ahead at all under the circumstances. It was a fair jury question as to whether or not the engineer was negligent.

Last Clear Chance Doctrine

This doctrine was not introduced into this case until after verdict and judgment in favor of plaintiff. It was brought into the case by appellant in the hunt for error upon which to obtain a new trial. As pointed out in appellee's original brief, pages 106, 107, it was appellant's claim that Instruction No. 12 submitted to the jury the rule of last clear chance. This instruction merely submitted specifically the question of negligence of the engineer and pointed out to the jury the facts and circumstances upon which a finding of negligence on the part of the engineer might be predicated. The Court did not instruct the jury that if the engineer had the last clear chance to avoid the accident that this would eliminate from the case plaintiff's contributory negligence, if any, and would avoid any reduction of damages on account of plaintiff's contributory negligence. The trial Court submitted to the jury the issue of plaintiff's negligence and correctly instructed on the effect of contributory negligence in reduction of damages. The trial Court also instructed that if plaintiff's negligence was the sole cause of his injuries, he could not recover.

[497-20] We feel that the Supreme Court has been misled by the brief and argument of appellant in respect to the last clear chance doctrine. Plaintiff made no claim that the last clear chance doctrine was applicable and did not invoke it. Plaintiff's claim was that under the Federal Employers' Liability Act, defendant being liable for the negligence of any of its agents or servants, that in this case there was a liability because of negligence of the engineer. To hold defendant liable because of the negligence of the engineer, it was not necessary or essential that the engineer had the last clear chance to avoid the accident. If the engineer was guilty of negligence, which in whole or in part, caused the injuries to plaintiff, defendant would be liable. If plaintiff

suffered injury through the combined or concurrent negligence of plaintiff and defendant, or its agents and servants, plaintiff is still entitled to recover, subject to diminution of damages in the proportion that his own negligence contributed to his injuries. If the engineer was negligent at all, plaintiff is entitled to recover. The engineer could be held negligent, regardless of whether or not he had the last cl-ar chanc- to avoid the accident. On reflection, it should be apparent to the Court that the last clear chance doctrine is of no importance or consequence in the decision of the case at bar for the very reason that the Federal Employers' Liability Act provides that the railroad carrier shall be liable in damages for the negligence of its officers, agents and servants, if such negligence, in whole or in part, causes injury to an employee, and further provides that contributory negligence shall not bar a recovery, and that assumption of risk is not a defense to the carrier's negligence.

[fol. 497-21] There is no occasion to invoke the doctrine of last clear chance in any case, except those in which contributory negligence is a complete bar to recovery, or in that class of cases wherein there is no duty to exercise care until after actual discovery of peril, such as trespasser cases.

It seems to us that the Court has erroneously held that the engineer's negligence is out of the case entirely because the Court is of the opinion that he, in fact, did not have the last clear chance to avoid the accident. Such conclusion is erroneous and contrary to the intent and purpose of the Act under which this suit was brought and maintained. Practically all of the cases cited by the Court in its opinion on this subject deal with cases wherein contributory negligence is a complete bar to a recovery, and those are cases in which it was necessary to invoke the doctrine and establish facts essential to sustain it. Those cases are not determinative of any issue involved in the case at bar. Instructions 4, 7, 8, 9 and 12, Transcript, pp. 19, 20, 21, 22 and 24, clearly establish that the trial Court did not submit the case to the jury on any last clear chance doctrine or theory.

The Fact That the Danger Was Obvious to or Discoverable by Plaintiff Does Not Exonerate Defendant From Negligence.

In support of this contention, we call attention to the case of *Outcelt v. C., B. & Q. R. Co.*, 150 Minn., 398, 185 N. W.

485, 497. That was an action involving insufficient clearance and was based upon the Federal Employers' Liability Act prior to the 1939 amendment. One of the defenses was as-[fol. 497-22] sumption of risk which the Court disposed of in favor of plaintiff. Some of the language therein is helpful in making clear the error which the Court has fallen into in the case at bar. In the *Outcelt* case, the Court said:

> "The yard had been in use for many years. So far as the record shows, the spacing between the tracks had never been changed. It does not appear that there ever had been a similar accident in the yards. If it was customary for brakemen to do what the deceased did on the evening in question, it is fair to assume that the danger of injury was not open and obvious to experienced brakemen, for it is not probable that with knowledge of the risks they ran, they would follow a practice which endangered their lives. Undoubtedly the danger was ever present, but we think it was a hidden one, and that its existence would not be apparent to a man of ordinary prudence, even though he had the experience and opportunities for observation which were possessed by the deceased. The deceased had the right to assume that the railroad company had used due care to provide a reasonably safe place for the doing of his work. The fact that tracks 5 and 6 were so near together that it was dangerous to ride where he rode was not so patent as to be readily observable, and hence, it was for the jury to determine whether he had assumed the risk of the injury which caused his death."

So much for the assumption of risk. The defendant made a further contention, however, which comes clearly within the position taken by the Court in the case at bar with respect to the effect of obvious or discoverable dangers, and we quote from the opinion of the Supreme Court in the *Outcelt* case, as follows:

> [fol. 497-23] "But it is contended that in the discharge of his duties, the deceased was not required to ride on the side of the engine or cars, that there was no necessity for his doing so, and that he voluntarily and unnecessarily took a position of danger when one of safety was reasonably available and hence, there can be no recovery. The general rule is that when a danger is

obvious and of such a nature that it can be appreciated and a servant is permitted to do his work in his own way, he is negligent as a matter of law if he selects a dangerous way when a safe one is available and he has knowledge, actual or constructive, that the way he selects is dangerous. Labatt, Mast. & Serv. (2d Ed.), p. 3433; Hoveland v. C. R. I. & P. Ry. Co., 110 Minn. 329, 125 N.W. 266; Popplar v. M. St. P. & S. Ste. M. Ry. Co., 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D, 383. This rule apparently relates to the subject of contributory negligence, Dun. Dig. 6008, and *contributory negligence does not bar a recovery in an action brought under the Federal Employers' Liability Act; it merely diminishes damages.*" (Italics supplied.)

No Showing by Defendant of Necessity to Maintain the Casein Spur Track so Close to the Casein Building at the Point Where Plaintiff Was Injured.

It appears without dispute in the evidence that the defendant exercised dominion over the Casein Spur track; it maintained the tracks and it alone operated over those tracks; they were under the jurisdiction of its roadmaster and other officials; its section men maintained and repaired them or, at least, were under duty so to do. This was true over a period of many years; defendant did not claim that it did not own the right-of-way or the land upon which the tracks were located; it made no showing whatever that [fol. 497-24] there was any necessity for having the track located so closely along the side of the Casein plant building; there was no showing that the unsafe place in question was permitted to exist because it was not within the power of defendant to avoid the same. There was no showing by defendant that any engineering problem was involved. As we understand and read the decision of the Court, its ruling was not based upon any engineering problem and the evidence in the case did not justify a finding that any engineering problem existed. In any event, there should not be any dismissal of the action on any such ground and the plaintiff should be given an opportunity to strengthen his case and to show by expert testimony, if that is essential, that there in fact existed no engineering problem which would require the maintenance of the track so close to the building. It is believed by us that the reasoning of the Court in the *Outcelt* case, as well as rules of common sense, are applicable to the

situation at hand, and that on all of the evidence and circumstances, it was a question of fact for the jury to say whether or not there was negligence in permitting the track to be so closely located and maintained along the side of the building at and in the immediate vicinity of the location of the accident.

Error of the Court in Holding That the Danger Was Obvious

It seems to us that the Court went beyond reasonable bounds in holding that the danger was so obvious on the side of the track next to the building and so safe on the other side as to permit a holding that plaintiff freely and voluntarily chose an unsafe place of work in preference to a safe place. Even if he did that, this would not bar a recov- [fol. 497-25] ery and, at most, would be no more than contributory negligence. The *Outcelt v. C., B. & Q. R. Co.*, 150 Minn. 398, 185 N. W. 495, case, *supra*, sustains that view, as does also the case of *Owens v. U. P. R. Co.*, 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683, *supra*.

Negligence of Engineer as Compared to Negligence of Plaintiff

The Court is clearly in error in holding as a matter of law that plaintiff had a better opportunity to know and avoid the danger than did defendant's engineer. That might be a proper inference for the jury, but not a conclusive one. The engineer had many years of experience in operating upon this and similar tracks. It was his duty to keep a look-out in the direction in which he was proceeding; he knew there was impaired clearance; he was required to watch and observe plaintiff, as well as to be alert to what was ahead. The engineer was in a much better position than plaintiff to see and appreciate the danger; the side of the building and the side of the car were all within the engineer's range of vision and he could not help but see and know that the space where plaintiff was, was gradually diminishing as the car proceeded ahead and around the curve.

As stated in our original brief, the engineer had a commanding view of the situation and by reason of his many years of experience in switching service, not only upon this track but on other industrial tracks, and in view of his testimony which has been quite fully quoted in the original brief,

and notwithstanding any disclaimers on his part of knowledge or notice of the danger, there is abundant evidence, [fol. 497-26] direct as well as circumstantial, on which any fair and reasonable minded jury could well conclude that the engineer was negligent. In contrast to the opportunities and situation of the engineer, the plaintiff, in the course of his work, was required to look in opposite directions for the purpose of keeping in contact with his switchman helper, as well as with the engineer. He was engrossed in his work and was working under distracting circumstances. He did not notice or observe that the car was crowding in on him so closely, that he would be crushed, and it was evidently while he was looking in the direction of Brown, the switchman helper, that he was caught and crushed by the center of the box car. The situation which defendant permitted to exist was the very kind of a set-up which was likely to catch a workman engrossed in the performance of his duties unawares. This Court must keep in mind that it was the absolute duty of defendant to provide and maintain a reasonably safe place of work and that if, by virtue of necessity, it was impossible to do so, then to give adequate and sufficient warning and notice of the danger to be apprehended.

Further Discussion of Cases Cited by the Court in Support of the Ruling That Negligence Was Not Established

In plaintiff's original brief, we distinguished most, if not all, of the cases cited by the Court in its opinion in holding that no negligence was shown by the evidence in respect to failing to maintain and provide a reasonably safe place of work, and called attention to the fact, at page 102 of our original brief, that of all the cases cited by appellant, the case of *Davis v. Hand*, 290 Fed. 73 (C. C. A. 8), is most [fol. 497-27] nearly analogous. That case, however, was decided prior to the 1939 amendment of the Federal Employers' Liability Act and clearly is not in point, for it is quite evident that the finding of no negligence was based upon the same kind of reasoning which in the past led so many Courts to a finding of non-negligence because the risk was obvious and known to the injured party. In other words, the Court, in fact, held there was no negligence of the master because the servant assumed the risk. In view of the fact that the Court, in its opinion, has cited the Minnesota case of *Stone v. Chicago, N. W. Ry. Co.*, 176 Minn. 104, 222

N. W. 641, we wish to call the Court's attention to the fact that this case is not in point at all, and that what the Minnesota Court said is mere dictum; while there was a charge in the complaint that defendant in that case was negligent in failing to provide and maintain a sufficient clearance between the track and the platform, such a claim was withdrawn and not urged before the Supreme Court of Minnesota. Hence, there was no occasion for the Court to rule on the proposition as to whether or not a railroad company could be held negligent in respect to the amount of clearance between a loading or unloading platform and the side of a box car. The space between a car and a loading platform is for the purpose of bringing cars into a convenient position to be loaded or unloaded at the platform. The plan did not intend a space for employees between cars and platform, and there was no need for employees to be in the space between them.

The platform cases are entirely different from such cases as the case at bar. Plaintiff was not injured between the car and a loading platform, or at a place where cars might be loaded or unloaded. The space between the building and [fol. 497-28] the track, other than at the platforms, was a place in which it was intended, or at least might be expected to be used, as a place where employees would work. If this were not so, defendant would probably have instructed its employees not to work there, or would have put up a sign or given notice that there was no clearance and to keep out of that place.

The Minnesota Court also said in the *Stone* case, as follows:

> "The deceased, having taken cars in and out of the building over this track daily for more than 8 months, was thoroughly familiar with the situation and *must be deemed to have assumed the risk* of the dangers necessarily incident to the doing of that work." (Italics supplied.)

In the case of *Ryan v. Twin City Wholesale Grocery Company and Minnesota Transfer Railway Co.*, 210 Minn. 21, 297 N. W. 705, the Minnesota Court, where the question was directly before it, at least in effect repudiated some of the things which it by dictum stated in the *Stone* case, at least insofar as the *Stone* case could be considered authority for the proposition that a defendant is not required to provide

a safe place of work for its employees on premises which are owned and controlled by another, but where it permits and requires its employees to work. In the *Ryan* case, plaintiff, who was in the employ of the railway company, was directed to work in the grocery company's building and, while at work therein, was injured by sacks of sugar falling which had been negligently piled by the grocery company's employees, causing injury to plaintiff. The trial Court instructed the jury that the railway company for the [fol. 497-29] purposes of that case would be liable for the consequences of any negligent piling of the sacks of sugar by the employees of the grocery company in the same manner as if the piling had been done by the railway company in the ordinary course of its business. The instruction was held to be correct on the theory that plaintiff, as appellant railway company's servant, "was entitled to a reasonably safe place wherein to work. The grocery company's building was the one place wherein appellant directed plaintiff to do all of his work. Hence, its duty was to use ordinary care to see that it was a reasonably safe place for that purpose."

The *Sullivan* case cited by the Court is of like character as are the other cases depended upon by the Court. In those cases, the injured were not defeated on the theory that there was no negligence because the danger was obvious, but on the theory that there was no liability because the plaintiff assumed the risk. The Supreme Court of Nebraska has been led into error because it has failed to appreciate that the fact that the danger was obvious does not mean that the defendant was not negligent. In many cases an injured plaintiff has been defeated because the danger was obvious, but that was usually either on grounds that he assumed the risk or was guilty of contributory negligence, which defenses operated as a bar to a recovery of damages prior to the enactment of the Federal Employers' Liability Act, and in respect to assumption of risk, operated as a complete bar to a recovery prior to the 1939 amendment.

[fol. 497-30] Conclusion

The decision and opinion of the Supreme Court has resulted in a grave injustice because of the errors into which the Court permitted itself to fall. Those errors should be corrected in and by the Supreme Court. A re-argument should be permitted so that the Court can be fully advised;

the original briefs, including abstract of testimony, were quite lengthy, and in view of the fact that this Court has not previously been called upon to pass on the questions herein presented, further opportunity should be allowed to aid the Court, as well as the parties, in making certain that no error is committed. Plaintiff should not be put to the expense of seeking a review of the decision in the United States Supreme Court if error has been committed, as we believe it has, by the Supreme Court of Nebraska. The length of the briefs and the limited time allowed for oral argument on the original hearing, was not conducive to a thorough understanding of a case such as this, and it is believed by us that it is in the interests of justice for this Court to reconsider the matters involved before final judgment.

Respectfully submitted, Tautges, Rerat & Welch, Minneapolis, Minnesota; Rosewater, Mecham, Shackelford & Stoehr, Omaha, Nebraska, Attorneys for Plaintiff-Appellee.

[fols. 499-500] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER SETTING CASE FOR REARGUMENT ON MOTION FOR REHEARING—October 13, 1945

It is by the court ordered that reargument on motion for rehearing herein be had at the session of court commencing November 5, 1945.

Robt. G. Simmons, Chief Justice.

[fols. 501-502] IN SUPREME COURT OF NEBRASKA

NEWTON W. ELLIS, Appellee.

v.

UNION PACIFIC RAILROAD COMPANY, Appellant.

JUDGMENT—March 22, 1946

This cause coming on to be heard upon motion of appellee for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the

court finds no probable error in the judgment of this court heretofore entered herein, to wit, on July 20, 1945. It is therefore, considered, ordered and adjudged that said former judgment of this court entered herein on July 20, 1945, be, and hereby is, adhered to, and that said motion of appellee for a rehearing be, and hereby is, overruled and a rehearing herein is denied.

Supplemental opinion by Chappell, Judge.

Robt. G. Simmons, Chief Justice.

[fol. 503] IN THE SUPREME COURT OF NEBRASKA

31889

ELLIS

v.

UNION PACIFIC RAILROAD CO.

SUPPLEMENTAL OPINION—Filed March 22, 1946.

1. Negligence, as defined in cases arising under the Federal Employers' Liability Act, is lack of due care under the circumstances; the failure to do what a reasonable and prudent man would have done, or doing what such a person would not have done under the existing circumstances.

2. The burden in such cases is upon the plaintiff to prove by a preponderance of the evidence that the employer was negligent in some manner as alleged in his petition, and that such negligence was the proximate cause, in whole or in part, of the injuries sustained.

3. The plaintiff is required to present probative facts as distinguished from mere speculation or bare possibility and the weight of the evidence upon both the question of defendant's negligence and proximate cause must be more than a scintilla to justify their submission to a jury.

4. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict, or otherwise, in accord with the applicable practice without submission to a jury, thereby saving the result from mischance of specula-
[fol. 504] tion over legally unfounded claims.

5. The foreman in charge of a switching crew movement will not be permitted to recover for an injury, due to his own negligent failure to act, merely upon the ground that possibly it might have been prevented if members of his crew in a secondary relation to the movement had done more.

6. The master's duty to provide his servants with a safe place to work extends to such parts of the premises only as he has prepared for their occupancy while doing the master's work and to such other parts as he knows, or ought to know, they are accustomed to use while doing it. If the servant voluntarily, and without custom or necessity, departs from the safe place to one more dangerous and is injured the master is not liable.

7. A railroad company will not be liable for injuries sustained by an employee where it was neither necessary nor customary for him, in performance of duty, to be in a position where he would be in danger of coming in contact with an obstruction on, over, or near its tracks, nor will it be liable where the obstruction causing the injury was maintained by a third person without consent of the company and was not under its control.

[fol. 505] 8. The court adheres to the result of its former opinion, *Ellis v. Union P. R. R. Co.*, 146 Neb. 397, 19 N. W. 2d 641.

[fol. 506] Heard before Simmons, C. J., Paine, Carter, Messmore, Yeager, Chappell and Wenke, JJ.

CHAPPELL, J.

Plaintiff, an engine foreman in charge of a switching crew, sought recovery for personal injuries received by him in a narrow clearance between a box car in defendant's service and the building of another because of alleged negligence of defendant. The action was predicated upon the Federal Employers' Liability Act. Upon submission to a jury plaintiff was awarded a verdict and judgment for $10,000. Motion for new trial was overruled and defendant appealed. The former opinion of this court, *Ellis v. Union P. R.R. Co.*, 146 Neb. 397, 19 N. W. 2d 641, held substantially that plaintiff having failed to prove any negligence charged the court erred in submitting the case to the jury and the cause was reversed and dismissed.

In motion for rehearing it was argued by plaintiff that this court had overlooked fundamental changes in federal construction of the Federal Employers' Liability Act requiring submission of similar cases to a jury for decision. We granted reargument on motion for rehearing but find from a study of cited cases that fundamental common law rules governing questions of alleged negligence of the defendant have not been changed. Therefore, this opinion will amplify the discussion of legal principles and apply them in a somewhat different manner but adhere to the result of our former opinion.

[fol. 507] The act and its construction by federal courts is of primary importance. We are mindful that the rights which it creates are federal rights governed by federal rather than local rules of law and that the sufficiency of the evidence to establish negligence of defendant under the Act is a federal question. *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; *Bimberg v. Northern P. Ry. Co.*, 217 Minn. 187, 14 N. W. 2d 410.

Section 51, Title 45, Railroads, U.S.C.A., provides: "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its *negligence*, in its cars, * * * track, roadbed, * * * or other equipment." (Italics supplied.)

Section 53 of the same title provides in part: "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proper-
[fol. 508] tion to the amount of negligence attributable to such employee: * * *"

Section 54 of the same title, as amended in 1939, also provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, * * * any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury

* * * resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *."

Similar cases were complicated by judicial construction before the 1939 amendment but thereafter they are comparatively simple. In other words, it has now been held that assumption of risk as a defense has been taken out of the act if defendant is negligent; that is, now the employee does not assume the risk of those dangers in his employment which are caused by or result from defendant's negligence. However, it is as important to remember that the employee still assumes the risk of those ordinary dangers in his employment which are naturally inherent in the business and not caused by or the result of defendant's negligence.

The act also authorizes the application of comparative negligence instead of barring the employee from recovery because of contributory negligence which is now useful or [fol. 509] available only to mitigate damages. In that connection the rule is that if plaintiff's evidence discloses that the employer is guilty of any negligence, in whole or in part, proximately causing or contributing to the injury the case must be submitted to the jury for decision regardless of plaintiff's negligence.

Recently it has been reaffirmed that the employer's liability must be determined under the general common law rule defining negligence as lack of due care under the circumstances or the failure to do what a reasonable and prudent man would have done or doing what such a person would not have done under the existing circumstances. As stated in *Tiller v. Atlantic C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 65 S. Ct. 444: "A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.'"

It is generally held that in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of a negligent act and that it ought to have been foreseen in the light of the attending circumstances. "Bare possibility is not sufficient. * * * Events too remote to require reasonable prevision need not be anticipated. * * *

[fol. 510] The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events." *Brady v. Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232.

Thus the premise in cases similar to the one at bar is that in order to recover under the act it is incumbent upon plaintiff to prove by a preponderance of the evidence that the employer was negligent in some manner, as alleged in his petition, and that such negligence was the proximate cause, in whole or in part, of the injuries sustained. In doing so he is required to present probative facts from which both the negligence and the causal relation can be reasonably inferred. An essential requirement is that mere speculation must not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 397.

In other words the weight of the evidence under the Act must be more than a scintilla, both upon the question of defendant's negligence and proximate cause, before the case may be properly left to decision of the jury. The applicable rule is that when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict, or otherwise, in [fol. 511] accord with the applicable practice without submission to the jury, thereby saving the result from mischance of speculation over legally unfounded claims. *Brady v. Southern Ry. Co., supra.*

The present case must be measured upon the foregoing basis. We will not again review the pleadings or evidence at length except as it may be necessary for purposes of clarity. Although plaintiff specifically alleged in his petition many charges of negligence by defendant the trial court did not submit all of them to the jury. The first instruction summarized plaintiff's allegations of negligence in substance as follows: (1) That defendant negligently moved the car which came in contact with him because the car was too large to safely move on the track, which track defendant negligently failed to maintain in a reasonably safe condition by permitting it to become uneven, with low joints, which caused the car while in motion to list in the

direction of the building, thereby greatly reducing the clearance between the car and the building; (2) negligently failed to provide and maintain a reasonably safe place for plaintiff to work between defendant's track and the adjacent building; and (3) negligently failed to warn plaintiff of the danger to which he was subjected while in the position he was necessarily occupying while performing his duties.

Further by Instruction No. 12 the trial court told the jury in substance that if they found from a preponderance [fol. 512] of the evidence that defendant's engineer knew, or in the exercise of ordinary care should have known and discovered, that plaintiff was in a position of peril and in the exercise of ordinary care could and should have avoided injuring plaintiff but negligently failed to do so, then it would be the jury's duty to find for the plaintiff.

We believe it is conceded by plaintiff that there was no evidence to sustain the first allegation of negligence submitted to the jury. In any event we have reexamined the record and find that issue without any support in the evidence. We believe that it does not require further discussion. Plaintiff's motion for rehearing and argument thereon is confined to the contentions that there was competent evidence for submission to a jury upon three summarized allegations, towit: (1) That defendant negligently failed to provide and maintain a reasonably safe place for plaintiff to work; (2) negligently failed to warn plaintiff of the danger to which he was of necessity subjected; and (3) that the defendant's engineer was negligent in proceeding with the movement when he knew, or in the exercise of ordinary care ought to have known, that plaintiff was in a position of peril.

In our former opinion we disposed of the two latter contentions as if plaintiff were relying upon the theory of the last clear chance, and that Instruction No. 12 submitted [fol. 513] that theory to the jury. Plaintiff argues that the doctrine of the last clear chance was not an issue in the case, and that Instruction No. 12 simply submitted the question of the alleged negligence of the engineer and pointed out facts and circumstances upon which a finding of negligence by him might be predicated. In that connection, however, the result must be the same whatever the nomenclature of the theory. It matters not whether we call it simple

negligence of the engineer, as argued by plaintiff; discovered peril, discussed in *Missouri P. R.R. Co., v. Skipper*, 174 Ark. 1083, 298 S. W. 849; the humanitarian doctrine applied in *Mooney v. Terminal R. R. Assn.*, 352 Mo. 245, 176 S. W. 2d 605, and *Moran v. Atchison, T. & S. F. Ry. Co.*, 330 Mo. 278, 48 S. W. 2d 881, or the theory of the last clear chance discussed in *St. Louis S. W. Ry. v. Simpson*, 286 U. S. 346, 76 L. Ed. 1152, 52 S. Ct. 520, and *Brennan v. Baltimore & O. R. Co.*, 115 F. 2d 555. That conclusion we believe to be inevitable because we find no evidence whatever in plaintiff's case from which it could be reasonably found that the engineer was negligent in any manner at any time, either before or after his discovery of plaintiff's peril. Therefore, the issue should not have been submitted to the jury upon any theory.

The facts in that regard are that plaintiff, as switch engine foreman, was officially the superior in charge of the entire switching crew, composed of an engineer, fireman, [fol. 514] headman, fieldman, and himself. Of necessity he was not without training and experience. The engineer was subject to plaintiff's commands as he backed south over the Casein spur at the Myrtle Street crossing. At that time plaintiff stood in the street on the engineer's side near the corner of the Casein building at or near a sign, approximately eight feet, nine inches high, bearing large type: "IMPAIRED CLEARANCE." The engineer continued the movement backward toward the south and at no time exceeded a speed of from one to two miles per hour. No such accident had ever happened in his previous experience. He never previously had observed employees working between the track and the adjacent building, at the point of accident. He was not aware that plaintiff would place himself in danger and the peculiar happening was not reasonably foreseeable by him. Plaintiff, although not required to do so, walked slowly toward the south. Just before the accident the engineer was more than half the length of the standard boxcar, 50 feet, 6 inches long, the length of the tender, approximately 35 feet, plus the distance from the tender to his position in the cab, away from plaintiff. The building, around which the car was to pass for spotting at its first platform, approximately 50 feet from the jutted corner thereof, was built in diagonals. At the inside apex of the curve of the track the building jutted slightly to ...

west although the wall of the building extending south from that point was generally the same distance from the track, [fol. 515] towit: 57 inches. At that jutted point, however, it was nearest the center of a car traveling south around the curve. At all other points north and south along the wall of the building except the one where plaintiff happened to be at the time of the accident there was sufficient clearance to avoid injuring plaintiff.

In other words, to be caught as he was, between a car and the building, it was necessary for plaintiff, the center of the car, and a space of approximately one foot at the jutted corner of the wall of the building all to be in exact apposition at the same instant of time and space. If any one of the three had missed apposition at the same instance plaintiff would not have been injured. The engineer, almost at the instant of the accident, saw that something was wrong and stopped immediately, so quickly that the center of the car which caught plaintiff between the car and the corner of the building had to be pulled forward through approximately that foot of space to release plaintiff.

Plaintiff himself testified that he made no attempt at any time to see where the car was coming or to observe the distance between the inside of the car and the side of the building. He admits that he was familiar with the fact that the car would overhang most in the center of the inside of the curve which was directly in front of him and that the narrow distance between the building and the car at the point [fol. 516] of injury was open and apparent to him at all times. Yet plaintiff admits that he took no precautions for his own safety and made no observations or effort at any time to try to save himself from injury.

From the foregoing facts we must conclude that there was no evidence that defendant engineer was negligent in failing to warn plaintiff of the danger or stop the car before the accident. With regard to the alleged negligence of the engineer we might well paraphrase and apply the language used by Justice Cardozo in *St. Louis S. W. Ry. v. Simpson, supra*: "The facts so summarized are insufficient to relieve the engineer (the engine foreman) from the sole responsibility for the casualty that resulted in his death (his injury). What was said by this court in *Davis v. Kennedy*, 266 U. S. 147, might have been written of this case. * * * It seems to us a perversion of the statute to allow his rep-

resentative (plaintiff) to recover for an injury due to his failure to act on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.'"

Also particularly applicable is the statement made in *Brennan v. Baltimore & O. R. Co., supra.* Therein it was said: "No matter what label is put upon the defendant's duty after the derailment it was in fact only to stop the movement as soon as it could under the circumstances created by the plaintiff's fault. * * * The defendant was con- [fol. 517] fronted with an occurrence wholly unexpected which took only a few seconds to end in disaster. The fault with which it is charged depends for its proof, as to which the plaintiff has the burden, upon nice calculations of speed, and quick action by brakes * * *. Such an uncertain basis for calculation to produce a test for the defendant's conduct does not rise above the level of mere speculation and fails to provide the substantial evidence of negligence required to prove the plaintiff's cause of action."

We come finally to the question whether defendant negligently failed to provide and maintain a safe place for plaintiff to work. It is conceded that the law so requires, and we will confine our discussion to the question whether, under the circumstances, plaintiff was so provided. The answer depends upon the facts and applicable law.

In that connection the master's duty to furnish a safe place to work is only to use reasonable care, and what is reasonable care depends upon the particular circumstances and the danger attending a place where the employee of necessity is required or accustomed to work in the performance of his duties. We inquire of necessity whether reasonable minds could in exercising impartial judgment, as distinguished from personal desire, differ in arriving at a conclusion upon the question of the alleged negligence of defendant in the construction, maintenance, and operation of its railroad. In doing so, the conclusion must be made by [fol. 518] ordinary men, based upon the facts as they exist and the law as written, and not what it ought to be regardless of what ordinary men see or know and regardless of laws which were written for application to the ordinary, practical affairs of men.

What are the facts? There is no evidence that defendant owned, constructed, or had any control over the Casein

Company building or the property upon which it was located. There is no evidence that it was constructed or maintained with defendant's consent. It was constructed or reconstructed following a fire after defendant's tracks were laid in their present form and manner. As heretofore observed, there was but one short space along its wall where clearance was insufficient and that only at the center of the car traversing it in passing around the curve. At all other points there was sufficient clearance. As heretofore indicated, there was no defect in the tracks themselves proximately causing the injury. It was not necessary for plaintiff at any time to see or contact fieldman Brown who then stood on the Cas-ine platform to the south. The evidence of plaintiff's witnesses is conclusive that all plaintiff needed or was required to do was cause the engineer to move backward until he, the engineer, could see and take signals from Brown. It was not necessary for plaintiff either to give or to receive any signals from Brown who did not enter the [fol. 519] picture until the car came around the curve far enough for him to contact the engineer and by appropriate signals spot the car at the platform. Plaintiff not only could have stood on the west side of the tracks to give the signals required of him but he could have stood on the east side at any point on Myrtle Street up to the Casein building and there controlled the actions of the engineer until the engineer could see Brown and contact signals from him. The plaintiff in performing his duties was not necessarily occupying the place or position where he was at the time of the injury. It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined.

Under such circumstances the failure of defendant to have engineers professionally redesign its system of track and move them farther west after construction of the Casein building, over which it had no control, was not negligence. Its alleged negligence was not a link in an unbroken chain of reasonably foreseeable events. The accident was simply a "Believe it or Not." As stated in *Brady v. Southern Ry. Co., supra*: "Bare possibility is not sufficient." Therefore, we conclude that plaintiff's evidence fails to establish any negligence of defendant, either in whole or in part, proximately causing the accident. It was proximately caused

solely by reason of plaintiff's own negligence without any [fol. 520] negligence of defendant proximately contributing thereto which bars plaintiff's recovery. We find no precedent holding otherwise. As stated in *Morris v. Pryor*, 272 Mo. 350, 198 S. W. 817, a case almost identical with the one at bar, wherein plaintiff was foreman of the crew engaged in a switching movement, the court said: "As much as we pity the respondent, whose heedlessness in a work requiring constant watchfulness has brought upon him this injury, we cannot see that the appellant, by negligence, has contributed to it in any degree."

It is stated in 1 Bailey, Personal Injuries (2 ed.), s. 79, p. 219: "The master's duty in respect to furnishing his servants a safe place in which to work, extends to such parts of the premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. If the servant voluntarily and without necessity departs from the safe place to one more dangerous, and is injured, the master is not liable."

The general rule is that "A railroad company is bound to exercise reasonable care and diligence to prevent obstructions on, over, or near its tracks, which are a source of danger to its servants and will be held liable for injuries occasioned by its neglect of duty. But the company will not be liable for injuries sustained by an employee where it was neither necessary nor customary for him to be in a [fol. 521] position where he would be in danger of coming in contact with such an obstruction, nor will it be liable where the obstruction causing the injury was maintained by a third person without the consent of the company, and was not under its control." 39 C. J., Master and Servant, s. 515, p. 397.

In *Haring v. Great Northern Ry. Co.*, 137 Wis. 367, 119 N. W. 325, plaintiff, a switchman, was caught between a car and a freight platform extending along a curve adjacent to the tracks but which was not designed to provide a place to work. In denying recovery, and distinguishing cases relied upon by plaintiff, the court said: "These cases do not rule this one, because in those cases the servant was expected to occupy the unsafe place in the performance of his duty, while in the instant case the servant was not required to perform his duties where he was injured."

In *Davis v. Hand*, 290 F. 73, a case from this circuit wherein recovery was denied, plaintiff, a fireman, was injured by being caught because of insufficient clearance between a coal bin maintained by defendant and the side of a car upon which he was climbing. In holding that no negligence of defendant was shown, point was made in the opinion that it was not necessary for plaintiff to be where he was in the performance of duty.

Plaintiff relies upon the case of *Sweet v. Michigan Cent.* [fol. 522] *R. R. Co.*, 87 Mich. 559, 49 N. W. 882, as being nearest in point with the case at bar. However, it is clearly distinguishable. In that case the building was on the premises of the defendant and under its exclusive control. Plaintiff therein was required to climb up a ladder on the side of a car as it was kicked in over a siding, and upon reaching the roof turn on the brakes to stop and spot the car at the place desired. The particular car was more difficult to mount than an ordinary car by reason of the ladder provided by defendant. The car was traveling as fast as a man could walk. An instant after warning was attempted but failed, plaintiff was caught while on the side of the car by a narrow clearance between the car and defendant's building. The court in its opinion, among other things, laid emphasis upon the fact that the building was a structure over which defendant could rightfully exercise exclusive control and that plaintiff's duties required him to be on the car. In the opinion the court distinguished *Illick v. Flint & P. M. R. R. Co.*, 67 Mich. 632, 35 N. W. 708, wherein it was said: "The duties of his employment did not require him to go upon the box car until he had passed the bridge. * * * Whether it was 14 or 24 feet wide was a matter of no concern to the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do." The latter authority reflects the situation in the case at [fol. 523] bar.

Likewise, other cases relied upon by plaintiff are distinguishable. In *Outcelt v. Chicago, B. & Q. R. R. Co.*, 150 Minn. 398, 185 N. W. 495, plaintiff, a brakeman, while in performance of duty, was riding on the side of the tender. While riding in that position he was caught between the tender and a car on defendant's adjoining tracks because of narrow clearance. The court in its opinion holding that the

action was properly submitted to a jury laid emphasis upon the fact that the evidence disclosed it was customary for plaintiff and like employees to ride on the tender in performance of duty and that under the circumstances the danger was a hidden one, the existence of which would not be apparent to a man of ordinary prudence.

In *Koller v. Chicago, St. P., M. & O. Ry. Co.*, 113 Minn. 173, 129 N. W. 220, telltale signals were fastened to a wire supported at both ends by upright poles erected between two passenger tracks. It was the engineer and fireman's duty to keep a watch for block signals and observe their condition. In performance of that duty plaintiff fireman stepped to the side of the engine and tender to take note of the condition of a nearby semaphore. He leaned out for that purpose and was struck by one of defendant's poles, which it had constructed and over which it had control. Under such circumstances, among other things, the court [fol. 524] held that whether defendant negligently placed its poles a reasonably safe distance from the tracks when it could have constructed them elsewhere, was a question for the jury.

In *Chicago Great Western Ry. Co. v. Peeler*, 140 F. 2d 865, the question was whether defendant was negligent in allowing the end of a plank at a street crossing to protrude above the surface of the ground over which plaintiff, a switchman, tripped while in performance of his duties and fell against a moving locomotive. It was shown in that case that switchmen, in performance of their duties, were required to dismount from moving freight trains and walk along the tracks beside the moving trains at that point. The court held in such a case that defendant's alleged negligence was a question for the jury.

Decision in *Ryan v. Twin City Wholesale Grocer Co.*, 210 Minn. 21, 297 N. W. 705, also turned primarily upon the fact that plaintiff, a freight checker for defendant railroad, was required to work in a building at a place in proximity to improperly piled sacks of sugar which fell upon him while in performance of duty. Also in *Bimberg v. Northern P. Ry. Co., supra*, the employee was in the performance of duty on a bridge at a place where he was required to work. Likewise in *Thomson v. Boles*, 123 F. 2d 487, it was said: "That it was necessary and proper for plaintiff to be on the walk-

way in giving signals to the engineer is not seriously controverted."

[fol. 525] The foregoing authorities all predicate the result in the case at bar and for the reasons heretofore stated, the motion for rehearing is overruled and we adhere to the conclusion that plaintiff's case should be reversed and dismissed.

Reversed and dismissed.

[fol. 526] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 527] SUPREME COURT OF THE UNITED STATES

No. 320, October Term, 1946

NEWTON W. ELLIS, Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 22d, 1946.

Dated this 11th day of June, 1946.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

[fol. 528] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 320

ORDER ALLOWING CERTIORARI—Filed October 25, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 320

NEWTON W. ELLIS,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

L. Wm. Crawhall,
William A. Tautges,
George Mecham,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 320

NEWTON W. ELLIS,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Nebraska

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Newton W. Ellis, the above named petitioner, and respectfully petitions this Honorable Court to grant Writ of Certiorari to review the decision and judgment of the Supreme Court of Nebraska rendered and entered on the 22nd day of March, 1946, in the case lately pending in said Supreme Court of Nebraska, styled *Newton W. Ellis, Plaintiff and Appellee,* v. *Union Pacific Railroad Company, Defendant and Appellant,* being No. 31889 of Causes on the docket of said Supreme Court of Nebraska reversing the judgment of Ten Thousand Dollars ($10,-

000.00) and costs of the District Court of Douglas County, Nebraska, in said cause, in favor of your petitioner and against the respondent herein, which said judgment of the Supreme Court of Nebraska became final on the 22nd day of March, 1946, by the overruling by that Court of petitioner's Motion for Rehearing. *Ellis* v. *Union Pacific Railroad Co.*, 22 N. W. (2d) 20 (R. 376).

That said Motion for Rehearing was duly and timely made after the Supreme Court of Nebraska filed, on July 20, 1945, a prior decision reversing the judgment of the District Court and dismissing the action. *Ellis* v. *Union Pacific Railroad Co.*, 146 Neb. 397, 19 N. W. (2nd) 641. Motion for Rehearing (R. 355).

That in response to said Motion for Rehearing the Supreme Court of Nebraska, on October 13, 1945, ordered re-argument of the motion for rehearing at a session of the Supreme Court of Nebraska commencing November 5, 1945; that re-argument was heard on November 7; Order on Rehearing (R. 376).

That thereafter the State Supreme Court, on March 22, 1946, rendered the decision and judgment now sought to be reviewed by Certiorari. Judgment of March 22, 1946 (R. 376); Opinion of March 22, 1946 (R. 377).

Decision and Judgment of the Court Below

The final decision and judgment of the Supreme Court of Nebraska is reported in — Neb. —; 22 N. W. (2nd) 20, and appears on pages 376-7 of the record filed herewith. The original decision of the Supreme Court of Nebraska, which is adhered to in its final decision and judgment, is reported in 146 Neb. 397; 19 N. W. (2nd) 641, and appears on pages 342-355 of the record filed herewith. It is believed by petitioner that comparison and analysis of the two decisions of the Supreme Court of Nebraska in this

cause manifestly discloses such vascillation and incongruity on the part of that court as to effectively make clear and certain its errors of judgment and law in dealing with a case arising under the Federal Employers' Liability Act involving Federal questions and Federal policy, and that the Supreme Court of Nebraska, through lack of full appreciation and understanding of Federal decisions and particularly those of the United States Supreme Court, has committed errors and deprived petitioner of his right and remedy under the Federal Employers' Liability Act and his right to a jury verdict, the injustices of which can now be corrected only on review by the court to whom this petition for a Writ of Certiorari is addressed.

Nature of Case and Summary Statement of the Matter Involved

This is an action at law under the Federal Employers' Liability Act (title 45, U. S. C. A. Sec. 51, et seq.; Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, et seq.), instituted by petitioner (plaintiff) against Union Pacific Railroad Company, Respondent (defendant) to recover damages for personal injuries sustained by petitioner on March 15, 1943, while employed by respondent as an engine foreman (switch foreman) of a switching crew engaging in respotting a box car as part of a switching movement then being carried on in the city of Seattle, State of Washington, in furtherance of respondent's business of interstate commerce and interstate transportation as a common carrier by railroad. Suit was instituted in the District Court of Douglas County, State of Nebraska, on August 16, 1943; after issue was duly joined the case came on for trial in the District Court of Douglas County, Nebraska, on June 8, 1944, before the Hon. James F. Fitzgerald, Judge, and a jury, and resulted in a verdict and judgment of Ten Thousand Dol-

lars ($10,000.00) in favor of petitioner (plaintiff). At the commencement of the trial (B. of E.), (R. 27), it was stipulated between the parties that plaintiff was subject to and within the protection of the Federal Employers' Liability Act as amended. In the switching operation being performed, plaintiff, while participating therein in the capacity of foreman, and while on foot, was caught and crushed between the side of a moving box car and the wall of an adjacent building as the box car was rounding a sharp curve in the track. The location and position of the building and the track, with respect to each other, the sharpness of the curve, the length and width of the box car, the fact that when the center of the box car, meaning approximately a point midway between the ends of the car, reached the apex of the curve, the side of the box car came within less than one foot of the building wall. These conditions, coupled with plaintiff's unfamiliarity therewith, and the fact that the danger was not readily observable to an employee engrossed and distracted in his work, as was plaintiff, created an obscure or hidden danger reasonably likely to bring about such an event as resulted in injury to plaintiff, in the absence of timely, adequate and sufficient warning. Plaintiff's petition (complaint) alleged, and the trial court submitted to the jury, in substance, the following issues of negligence.

1. That in the switching operations in which plaintiff was then engaging, the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place of work.

2. That it negligently failed to provide and maintain adequate, safe and sufficient clearance between the track on which it was moving an engine and cars and a certain building or fixed structure near said track.

3. That it negligently moved on said track a certain car which was too large to safely move on said track and

that said car * * * bulged to such extent as to greatly lessen the clearance between the bulging side of said car and said building or fixed structure.

4. That it negligently and carelessly failed to maintain its said tracks in reasonably safe condition and permitted the same to be rough, uneven and unstable, and permitted low joints to exist therein, all to such extent as to cause said car, while in motion, to list, sway, pitch and lurch in the direction of said building or fixed structure, thereby greatly reducing the clearance between the side of said car and said building or fixed structure.

5. That it negligently and carelessly moved said car in the direction of and past said building or structure * * * and that it failed to exercise reasonable care for the safety of plaintiff, either by keeping a proper lookout, or otherwise, and that it negligently and carelessly failed to warn plaintiff of the danger to which he was subjected while in a position he was necessarily occupying in such switching operations. (Paragraph VIII of Petition, R. 3.)

The above are quotations from the plaintiff's petition (complaint).

The trial court, by its instruction No. 1, restricted the issues of negligence as follows:

> "(a) Plaintiff alleges that the said squeezing caused him severe and permanent injuries and alleges that said injuries were caused by the negligence and carelessness of the defendant company.
>
> "(b) He alleges that defendant failed to provide plaintiff with a reasonably safe place to work and alleges that it failed to provide adequate and sufficiently safe clearance on the track on which it was moving an engine and cars, and the building structure near the said track.

"(c) Plaintiff alleges that the defendant was guilty of negligence in moving the car which came in contact with plaintiff, in that the said car was too large to safely move on said track.

"(d) He further alleges that the defendant negligently and carelessly failed to maintain its said tracks in a reasonably safe condition and permitted the same to become uneven, and permitted low joints to exist therein, which plaintiff alleges caused the car, while in motion, to list in the direction of the building, and alleges that that greatly reduced the clearance between the side of the car and the said building.

"(e) He further alleges that defendant negligently failed to warn plaintiff of the danger to which he was subjected while engaging in the switching operations, and

"(f) Alleges that he was necessarily, in the performance of his duties, in the position in which he was at the time of his injuries."

(Instruction No. 1) (R. 9-11.)

The able trial court fully, fairly and clearly instructed the jury on negligence and contributory negligence, and the responsibility of a common carrier by railroad for the negligent acts and omissions of its officers, agents or employees, *et cetera*. (Instruction No. 7.) (R. 13.)

And with respect to negligence of defendant's locomotive engineer, instructed:

"If you find from a fair preponderance of all of the evidence that defendant's engineer, who was operating the locomotive shoving the car in on the Casein Spur Track, knew, or in the exercise of ordinary care should have known and discovered that plaintiff was in a position of peril, and that the engineer, in the exercise of ordinary care could and should have avoided injuring plaintiff, and you find from a preponderance of the evidence that the engineer negligently failed to do

so, then it would become your duty to find a verdict in favor of the plaintiff."

(Instruction No. 12) (R. 15). In connection with the above instruction it should be noted that Instruction No. 9 (R. 14) provides for reduction of damages by virtue of contributory negligence on the part of plaintiff.

There was substantial evidence of negligence on the part of defendant which was a proximate cause of plaintiff's injury in at least three particulars, namely:

(a) Failure to provide and maintain for plaintiff a reasonably safe place of work.

(b) Failure to instruct and warn him against the dangerous trap in which he was caught.

(c) Negligence on the part of the locomotive engineer.

For a comprehensive understanding of the essential facts, and to demonstrate the inaptitude of the Supreme Court of Nebraska and its errors in failing to determine Federal questions in accordance with Federal rules in the case at bar, we call to the attention of the Court the following facts and circumstances surrounding the occurrence of the injury to petitioner (plaintiff), and the substantial supporting evidence: at the trial it was stipulated and agreed that plaintiff's Exhibit I is a plat of the scene of the accident, correctly prepared according to a scale of one inch to twenty feet; that the measurement of distances which are shown upon the Exhibit in figures are substantially correct, being within an inch or two of the actual distances existing on March 15, 1943 (date of the injury), and that the track shown leading from and to the west of the Casein Co.'s Spur Track was not connected with the Casein Spur on the day of the accident, and was not then, nor for many years prior thereto, in use; that the plaintiff

did not, by offering the plat in evidence, admit that the "impaired clearance sign" shown on the plat was in the position so shown on March 15, 1943.

Newton W. Ellis, plaintiff, aged 42 years, resided at Port Orchard, Washington, 18 miles from the city of Seattle, and had been in defendant's employ since April, 1942. He had completed eighth grade and had about one year in high school, following which he engaged in farming, and followed the trade of a plasterer for about fifteen years; about the year 1922 or 1923 he was employed by Southern Pacific as a brakeman for about one year. Aside from this he had no other railroad experience until employed by defendant. (B. of E. qs. 7-34), (R. 28-30). He was employed by defendant as a brakeman and switchman at Seattle, Washington, from the beginning, working first in the Argo Yards, switching box cars in connection with making up and breaking up trains. At the time he was injured, he was engaged in industrial work outside of the Argo Yards, which consists of picking up loaded cars or taking empty or loaded cars to industries, and first engaged in such industrial work in the summer of 1942 as a helper switchman. (B. of E. qs. 34-37). (R. 30).

He was engaged on different shifts at various times while he was a helper and engine foreman, starting with a night shift while on the extra board, and was promoted to engine foreman in February, 1943; and on the day of the accident was on a shift which started to work at 4:00 o'clock in the afternoon. Prior to the day of the accident, he had never worked either as a foreman or helper in on the Casein Spur Track, shown on Exhibit I, and was not familiar with the clearance between the Casein building and the side of the cars rounding the curve in the Casein Spur Track. (B. of E. qs. 48-61.) (R. 31-32.)

Specifically, he testified as follows:

"Q. Prior to March 15, 1943 had you, either as a switchman or as a switchman's helper, ever worked in on the Casein Spur Track, shown on that Exhibit, (Exhibit I.)?

A. No.

Q. Well, what is the fact, Mr. Ellis, as to whether or not prior to the time of the accident, you knew or had any knowledge of what the clearance was between the Casein Building and the Casein Spur Track?

A. No.

Q. Prior to the time you were injured, what is the fact as to whether or not you had any knowledge of the degree of curvature in the Casein Spur Track?

A. No. (R. 31-32).

To thoroughly understand the situation and the circumstances under which plaintiff met with injury, reference is made to the plat (Exhibit I), which shows the *locus in quo* and surrounding territory. Myrtle Street, shown on the plat, runs in a general easterly and westerly direction; Myrtle Street Track occupies a part of Myrtle Street and runs in a general easterly and westerly direction; the Casein Spur Track comes off the Myrtle Street Track from the northeast across Myrtle Street and follows along the westerly side of the Casein building, which is on the south side of Myrtle Street, and immediately east of the Casein Spur track; a portion of the westerly wall of the Casein building consists of diagonals instead of a straight wall; the Casein Spur track curved sharply around this diagonal wall; an engine or cars moving in on the Casein Spur Track would proceed in a general southerly direction; an engine or cars moving out of the Casein Spur Track would proceed in a general northerly direction; to get either in or out of the Casein Spur Track it was necessary for the engine and any cars which might be attached thereto to move east a suffi-

cient distance of the junction point and switch of the Myrtle Street Track and the Casein Spur Track because the Casein Spur Track came off the Myrtle Street Track.

Prior to the day of the accident, which occurred about 7:00 o'clock P. M. (war time), plaintiff had never worked in on the Casein Spur Track, either in the capacity of helper switchman or engine or switch foreman, and had never been warned, notified or instructed of and against the obscure danger spot where he was caught, crushed, squeezed and injured between the side of a box car and the wall of the Casein building, as the box car was rounding the curve of the Casein Spur Track. During the afternoon of the day of the accident plaintiff had been instructed by yardmaster Ross to pick up a load in the Casein plant; the crew, of which he was foreman, consisted of the engineer, G. J. Buzard, the fireman (name unknown), switchman helpers J. C. Brown and Edwin P. Field. The first work done by the crew was to obtain some loaded cars from the Boeing plant, which was approximately one mile or more from the Casein Co. plant; after leaving the Boeing plant the cars there obtained were left on a passing track and the crew proceeded with the engine only down to the Casein Co., coming in on the track designated on the plat as the "Fox Avenue Track," which connects with or is a continuation of the track shown on the plat as the "Myrtle Street Track," the connection being made with a switch shown upon the plat and identified by plaintiff with the letter "E". The engine was headed east after it reached the Myrtle Street Track about 7:00 P. M., (war time), at which time plaintiff was riding the rear footboard and got off the locomotive when it came to a stop at switch "E". (B. of E., qs. 62-101). (R. 32-35). He then walked south toward the loading docks on the west side of the Casein building to determine which of the two cars then on the Casein Spur Track was to be taken out, following the

course shown on the plat (Exhibit I) by the dotted line extending from letter "A" near switch "E" to letter "B". (B. of E., qs. 103-109) (R. 35-36), and upon arrival ascertained from examining tag affixed to side of the car that the car to be taken out was the second or most southerly car of the two. Whereupon he signalled for the engine to back in on the Casein Spur Track, couple into the first car and then the second (cars were standing some distance apart), and while that movement was being made plaintiff stood beside the track, but did not remember whether this was the east or the west side. (B. of E., qs. 110-115) (R. 36). The engine, with the two cars attached, then pulled out of the Casein Spur in a northeasterly direction and into the Myrtle Street Track and then west on the Myrtle Street Track far enough to get beyond the curve (shown in the track on Exhibit I), for the purpose of getting on straighter track, as cars do not uncouple very well on a curve. Plaintiff did not remember who gave the signal to pull off the Casein Spur. (B. of E., qs. 116-125) (R. 36-37). After the engine and two cars had moved west along the Myrtle Street Track it was Ellis who uncoupled the westerly car from the one left attached to the engine and he walked to this point on the westerly side of the Casein Spur track. After this uncoupling was made on the Myrtle Street track it was necessary to pull east on that track far enough and over the Casein Spur switch so that the car attached to the engine could be respotted in on the Casein Spur opposite the first loading platform of the Casein building. After uncoupling the car on the Myrtle Street track preparatory to respotting the other car back on the Casein Spur track, Ellis walked to the point "XW" (see plat, Exhibit I) for the purpose of flagging the Myrtle Street crossing, (formed by Casein Spur track running over Myrtle Street), and as no cars (automobiles) were coming along Myrtle Street, walked to

the point "XY", (See plat, Exhibit I), on the easterly side of the Casein Spur track for the purpose of passing signals. (B. of E., qs. 134-141). (R. 38).

Petitioner then testified as follows:

"Q. Why did you take that side to pass signals?

A. It is the side the crew works on, the engineer's side.

Q. Was that the usual and customary side to work on in passing signals?

A. Yes."

(B. of E., qs. 142-43). (R. 38-39).

After crossing to the position indicated plaintiff testified as follows:

"Q. After you crossed the track and got over onto the east side of the Casein Spur track, did you make any observations to see the engine?

A. Yes.

Q. Just tell us what you did and how you did it.

A. I looked toward the engineer and looked to see Mr. Brown, to see where he was.

Q. Well, when you looked in the direction of the engineer, what *what* was he doing?

A. He was watching me.

Q. Then you say you looked in the direction of Mr. Brown?

A. Yes.

Q. Where was Mr. Brown supposed to be?

A. He was supposed to be at the loading platform, that is, the first one."

(B. of E., qs. 151-157) (R. 39-40). (The loading platform referred to is the first platform of the Casein building coming in on the Casein Spur, and is shown on the plat, Exhibit I; this being the platform where the car which was being shoved in by the engine was to be spotted.)

Plaintiff then testified as follows:

"Q. Why were you looking to see where Mr. Brown was?

A. I wanted to see if he was at the platform or not to pass signals.

Q. Was it part of your duty or not to give Mr. Brown signals, or be in a position to either give or take a signal from Mr. Brown?

A. Yes, that is right.

Q. Was it also your duty to be in a position to be able to either give a signal to the engineer, or to transmit a signal that you might get from Mr. Brown?

A. Yes, that is true.

Q. Now, then, after you crossed the Casein Spur track for the purpose of being in position to either give or take signals, do you recall whether or not you moved for some distance either to the south or north?

A. I do not recall. I moved a few feet in there . . . yes, toward the south.

Q. Why did you do that?

A. To get a better view.

Q. To get a better view of what?

A. To see if I could get a better view of Brown. It is on a curve.

Q. While you were in that position between the Casein Spur track and the Casein Co. building, what happened?

A. Well, I looked to see Mr. Brown, and I could not see him, and the end of the car went past, and just as I looked back toward the engineer, the middle of the car caught me.

Q. The front end of the car, when that went by, did that clear you in good shape?

A. Yes. If it had not, it would have pushed me out of there.

Q. How much of the car got by you before you got into trouble?

A. About half of it.

Q. Up to the time that car came in contact with you, did you know that you were either in a place of danger or where there was insufficient clearance?

A. I didn't know it."

(B. of E., qs. 159-68.) (R. 40-41.)

Reference to the plat, Exhibit I, discloses that the place where plaintiff was caught and crushed between the side wall of the Casein building and the middle of the box car was at the point of narrowest clearance between the easterly rail of the Casein Spur track and the side of the building. This point of narrowest clearance extended along the building wall for a distance of approximately one foot; this point was directly opposite the apex of the curve. It was the single spot between the track and the building in which such an accident could occur; it could occur probably only with a box car of the width and length of the one here involved, 50 ft. 6 in. long, and 10 ft. 7 in. wide, this being about as large a box car as was operated on defendant's system. (R. 229-30.)

It was when the center of this large box car reached the apex of the curve that the side of the box car so crowded the wall of the building as to trap, crush and squeeze plaintiff between the side of the car and the building, causing him to be wedged in there so tightly that an indentation was made in the corrugated metal wall of the building at a point above the ground about level with plaintiff's chest and shoulders, inflicting severe injuries with fractures in the upper half of his body. Measurements made after the accident indicate that the clearance between the side of the car and the Casein building at the point where plaintiff was injured was about 10 inches. (R. 231.)

Melburn H. Estes, General Yardmaster of Union Pacific Railroad Co. over a period of years, including March 15, 1943, testified that he was familiar with the Casein Spur

track for the past ten years, had worked there as a brakeman or switchman, and had supervision over the engine foremen; that he was acquainted with plaintiff and had recommended his promotion as an engine foreman; that he had supervision over the Argo Yards; that the Casein Spur track was within defendant's switching district; that he had nothing to do with supervision over the track since that is a matter handled by the Roadmaster, (R. 224); that no change had been made in the location of the track, to his knowledge, within a period of ten years, (R. 228); that when repairs are required to the Casein Spur track the work is done by Respondent's section crew; that any car moving around the curve on that track gets closer to the side of the building as it rounds the apex of the curve, and a 50 ft. car would come closer than a 40 ft. car, (R. 236-37); that it is characteristic of all cars on all curves to overhang the greatest in its center, in the inside of the apex of the curve. (R. 237.)

H. B. Coburn, Assistant Superintendent of Respondent at Seattle over a period of 12 years at Seattle, and so employed at the time plaintiff was injured, had supervision over the yardmasters and indirect supervision over the roadmasters; that he had been familiar with the Casein Spur track and the clearance between the track and the building over a period of 12 years and recalled that the Casein building was constructed on the site formerly occupied by the Fox River Butter Company, following the time that the Butter Company building was burned; did not recall that any change was made in the location of the Spur at that time. (R. 238-40.) That tracks in zone 5 (Casein Spur track in this zone) were under his supervision with respect to operation, and under the supervision of the roadmaster with respect to maintenance, the yardmaster having no responsibility in connection with maintenance except to report defects. The section men are under the supervision of the roadmaster. (R. 240.)

J. C. Brown, helper switchman and member of plaintiff's crew on the day of the accident; had worked with plaintiff the day before the accident and on three or four prior occasions; however, the day of the accident was the only time that this witness had any recollection of working on the Casein Spur with any switching crew of which plaintiff was a member. (B. of E., qs. 2333-43), (R. 203-204), (B. of E., q. 2380), (R. 207.) Brown had been working on the same shift for a period of about three or four months prior to the time of the accident, during which he had occasion to be working on the Casein Spur on an average of two or three times a week. Prior to the start of the movement being made, at the time plaintiff was injured, this witness had walked in on the Casein Spur to the first loading platform of the Casein building, a distance of about 100 feet from Myrtle Street, for the purpose of spotting the car at the first loading platform. The front end of the Casein building is about 15 feet south of the south edge of the pavement of Myrtle Street, and the Casein Spur track crosses Myrtle Street in a southwesterly direction and curves around the building. The first loading platform extends out about a foot. (B, of E., qs. 2344-66.) (R. 204-206.) While the movement was being made, Ellis was in a position between the witness and the engine, which was backing in, making the movement with the box car coupled to the tender. Witness was standing at the door of the first platform on the east side of the track, but could not see either plaintiff or the engineer from this position. He had assisted in doing similar work on this track, and having observed plaintiff on the engineer's side when the movement was started, and not having received any instructions from plaintiff that he would work on the other side, assumed that plaintiff would be working on the engineer's side of the track. (B. of E., qs. 2367-80.) (R. 206-207.) With an engine backing in on the Casein Spur track,

the engineer's side of the engine is that side of the engine which is next or nearest the Casein building; so plaintiff, in working on the engineer's side, was working in a position between the Casein building and the Casein Spur track. Brown, while standing at the first door of the Casein building, at the first loading platform, and watching the end of the car come toward him, observed the car come to a stop, and hearing someone holler, knew something was wrong so walked between the car and the building and found plaintiff pinned in between the car and the building, facing him in an upright position, squeezed so tightly that he could not get his hand between the car and plaintiff's shoulder to work him free, so he called to the engineer to pull up ahead toward Myrtle Street. From his position on the south side of plaintiff he could see the engineer. There was an indentation in the side of the building where plaintiff was caught which was about five feet above the ground and appeared to have been made by plaintiff's shoulders. Plaintiff was caught about the center of the car. It was necessary to move the car to extricate plaintiff. Brown was fearful that if the car was moved further back (south) that it might injure plaintiff more seriously, although the clearance became wider south of that point, but was also wider "the way he (Ellis) walked in and I thought the logical thing to do was to roll him out the way he walked in." It appeared to Brown that plaintiff was caught at the point where the clearance was narrowest between the building and the side of the car, which was due to the fact that the car was rounding a curve. When the car was pulled ahead, plaintiff was turned half the width of his body and possibly two or three inches farther. When he first reached the plaintiff, the car was standing still; in order to release plaintiff, it was moved forward about 14 inches toward Myrtle Street and then rolled back a distance of three or four inches, at which time Brown, with the help

of Field, the other switchman of the crew, was able to release plaintiff, who was then laid on the ground. (B. of E., qs. 2424-34-35-59.) (R. 212-216.)

Usual and Customary to Work on the Engineer's Side of the Casein Spur Track

G. J. Buzard, locomotive engineer of the engine moving the box car at the time plaintiff was injured, had been in the employ of Respondent at Seattle for approximately 29 years as a locomotive fireman and engineer, and had been employed as engineer in the Argo Yards for about three years immediately prior to plaintiff's injury, and in the capacity of fireman and engineer had worked on the Casein Spur over a period of 18 years. (H. 169-170-172.) That Ellis was working on the proper side of the Casein Spur track, that is, between the Casein building and the track, in the work in hand at the time he was injured, is emphatically and decisively established by the following testimony of the engineer Buzard:

> "Q. Can you tell us whether or not Mr. Ellis was working on the customary side in respect to the movement you were making at the time of the accident?
>
> A. Well, all I can say about that is that previous to this accident and including all of the time I was firing an engine I never saw a man work on the other side of the engine. He always works on the engineer's side.
>
> Q. In on that Casein Spur track?
>
> A. Oh, I would say maybe once or twice they have worked on the fireman's side since then, but most always they worked on my side."

(B. of E., qs. 2257-62.) (R. 196.)

Negligence in Failing to Give Timely and Adequate Notice and Warning of the Danger Point on the Casein Spur Track

It has already been pointed out that Ellis had but little railroad experience; at the time of the accident he had been a switch foreman for only about a month, and the day of the accident was the first time that he had ever worked in or about the Casein Spur track in the capacity of a switch foreman; he had no knowledge, notice or information as to the dangerous and hazardous condition which existed at the one point on the Casein Spur track where such an accident could happen; he had received no warning, notice or instruction of any kind, either from the engineer of the crew or any other member. None of his superiors ever warned or instructed Ellis in respect to the existing conditions which created a dangerous trap at this particular spot. Except for the spot where plaintiff happened to be standing at the time he was caught, there was sufficient clearance to avoid injury to a person between the side of the building and the box car moving along the track. This dangerous spot covered a space of approximately one foot in width. In order for plaintiff to be caught it was necessary that he be at this precise spot at the time the center of this large box car came up to him. Had he been at a point either a few inches north or south of this particular spot he would not have been injured. To catch an employee engrossed in his work it would have been difficult to devise a more effective trap to accomplish such purpose. In considering this phase of negligence it should be borne in mind that defendant was chargeable with knowledge of this condition; it had operated and maintained this track for many years; there was plenty of available space either to modify the curve or to move the track a few inches, and much more, away from the building; there was no

showing of necessity for maintaining such a trap. If such a trap was unavoidable, the imperative duty to give adequate warning of the danger existed.

(B. of E., qs. 414-17-23-24-25.) (R. 63-4.)

Negligence of Engineer

Engineer Buzard up to March 15, 1943, had behind him nearly 29 years' experience as a locomotive fireman and engineer in the service of Respondent, and during that period had operated on the Casein Spur many times over a period of 18 years. He admitted that he was thoroughly familiar with the location of the Casein building with reference to the spur track; knew that the spur track was "a dead end track"; knew that the Casein Spur track was located rather close to the Casein building and that as that track approached and came around the westerly side of the building and in a southerly direction, that the track had quite a sharp curve; that he could not recall any other track that was as close to a building or fixed structure as was the Casein Spur. (R. 172-3, 177.) He knew that as he moved the box car over the curve in the track that some part of the side of the car would get closer to the building. This is illustrated by his testimony, as follows:

> "Q. Do you know whether or not with a 50 ft. car some part of the side of the car would get closer to the building than it would with a 40 ft. car?
>
> A. Yes, sir.
>
> Q. And what is the fact as to that?
>
> A. What do you mean, fact?
>
> Q. Well, would the 50 ft. car, some portion of it, get closer to the building rounding that curve than some part of the side of a 40 ft. car?
>
> A. Well, as I say, yes, the 50 ft. car would naturally crowd the diameter of a circle more than the 40 ft. would.

Q. The sharper the curve is, would that bring some portion of the side of the car closer to the building?

A. Yes, I think my previous answer would be the answer to that, wouldn't it?

Q. That is what I want to know, I want to get your answer and not any suppositions.

A. Yes.

(B. of E., qs. 2193-2197.) (R. 189.)

Later he attempted to qualify the effect of the above testimony by claiming that he did not become aware of such facts until after the accident to Mr. Ellis, notwithstanding his many years of railroading, during which time he had shoved and pushed many box cars around various degrees of curves. He admitted, however, that when shoving a car either on straight track or curved track, if looking in the direction of the movement he could see the side of the car on straight track; that he could also see the side of the car as it was rounding the curve, but, of course, could not see that part of the car which got beyond or behind the curve; but admitted that he could see at least half the length of the car. (Note: The engineer's side of the engine was on the inside of the curve, so it is obvious that as long as he could see Ellis he could also see that the side of the car was crowding and converging in the direction of Ellis and the building wall.) He further testified as follows:

"Q. Well, you have already told us your eyesight was good and you were keeping a vigilant lookout ahead.

A. Yes.

Q. But when you saw Mr. Ellis you could also see the car within range of your vision, could you not?

A. Yes, the car was within range of my vision. I saw it until part of it went by and the other part I could not see. That was around the curve."

In operating the engine he was riding within the cab on the engineer's side looking out of the side window. He testified further:

"Q. Looking out of the side window you could see Mr. Ellis?

A. As I say, just half or two-thirds of his body standing there around this little curve.

Q. Well, you could see the upper part of this body?

A. Yes, sir.

Q. His arms?

A. I do not remember it. As I recall, I cannot say I remember exactly his arms. I do not recall that.

Q. Well, as a matter of fact, you could see his head and body and legs and feet, could you not?

A. Yes, sir, that is, that side of him.

Q. As a matter of fact, you could see the whole of him.

A. That is what I was looking at . . . the whole of him . . . Well, not at all of him, the right side of him, more or less the right side, whatever I could see of that side, because he kind of had his back partially to the building, understand?

Q. You could see his face?

A. Only when he turned around a couple of times and looked to see if I was still in sight."

(B. of E., qs. 2225-2230.) (R. 192-193.)

In describing the manner in which the accident occurred the engineer testified:

"Q. Well, now, you kept your eye on Ellis from the time you started to shove in on the Casein Spur until he was hurt. What was he doing?

A. Well, he was standing in the . . . well, first he walked in a ways, as I recall it, he walked in a ways, half a car length in there, and then he stopped and every once in a while he would look back and see if he could see me to be sure he would not get out of my sight because the rules say the minute he gets out of my sight

I stop. That is a stop signal, so I kept crawling back in there and watching him all the time, and the first thing I knew I saw his right foot twisted on the ground and I stopped right there, but that was not supposed to be and I could still see all of his body.

Q. You could still see all of his body?

A. Yes, sir.

Q. Now, before anything happened to Mr. Ellis, had part of the car got by him?

A. It had to because he was caught in the middle of the car.

Q. But I am asking you now about what you saw. Did you see the front end of the car?

A. No, I was not paying any attention to that at all. I was just looking at him. I never even looked at the car at all. I was just looking at him.

Q. But in looking at Mr. Ellis you could not help but see the car?

A. Well, naturally, you could see the car going by him, if you want to put it that way, but naturally I was looking at him.

Q. Well, in looking at him you did see part of the car go by him?

A. Well, I think you sense that more than you see it."

(B. of E. qs. 2211-2216.) (R. 191.)

Exhibit 14 (R. 248A). A certified copy of the Monthly Met-orological Summary of the United States Department of Commerce Weather Bureau at Seattle for the first 15 days of March, 1943 shows that the sun set on March 15 at 6:14 Pacific Standard time, or 7:14 Pacific War time.

Engineer Buzard had a commanding view of what was going on ahead. He was an experienced engineer and had operated on the Casein Spur track many times over a period of 18 years. During the particular movement we are here concerned with he observed the plaintiff at all

times, and that was his duty in the movement such as was being made.

Exhibit 2 (R. 56A) is a picture taken of the side of the Casein building, with the camera facing south, showing a portion of the Casein Spur track and a part of the abandoned track leading therefrom. The white spot in the picture is a sun spot near the indentation in the wall of the building, which is the point where plaintiff was standing at the time he was injured. (R. 55.)

Exhibit 3 (R. 58A) is a picture of the Casein building, with the camera facing north and a little bit east, showing Myrtle Street as a white streak in the background ahead of a car of lumber, which was not in that position on the day of the accident, showing plaintiff in the position which he was occupying at the time he was injured, and also showing a portion of the Casein Spur track and the abandoned track in the left foreground, the picture being taken at the same time as Exhibit 2, in the month of April, 1944. (R. 57-8.)

Exhibit 4 (R. 59) is a photograph taken at the same time with the camera facing southwest, showing a portion of the wall of the Casein building and a part of the Casein Spur track, and also a part of the Continental Can Co. building in the background. The relationship of the tracks to the building, as shown in the photographs, was the same at the time of the accident. (R. 61.) Exhibit 40 (R. 326A), Exhibit 41 (R. 328A), and Exhibit 42 (R. 328-B) were photographs taken by Respondent a few days after the accident; Exhibit 43 (R. 332A) is a picture taken at the scene of the accident December 3, 1943. Exhibit 40 shows substantially, or approximately, the position of the box car at the time plaintiff was released after the accident. When this picture was taken the camera was north of Myrtle Street

and pointed toward the car. (R. 325-6.) Exhibit 41 shows the south end of the car on the Casein Spur track in the same position as Exhibit 40, taken with camera facing generally to the north. (R. 327.) Exhibit 42 is a view of the same car while in the same position, showing the north end of the car and taken with the camera facing generally to the south, the camera being about four or five feet above the ground. (R. 327-8.)

These photographic exhibits, when considered from the standpoint of what view the engineer had, would be deceptive unless considered in connection with the plat, (Exhibit 1.), and the position of the engineer looking out of side window of the engine cab. The evidence fully warrants a reasonable inference that the engineer could and should have observed the side of the car crowding in the direction of plaintiff; that the engineer could and should have known that plaintiff was in a position of danger and unaware of it; that the engineer should have halted the movement and warned plaintiff; that the engineer, in the exercise of ordinary care, could and would have avoided this accident.

Evidence Favorable to Defendant. While it is believed by petitioner that the summary of facts contains all that is essential to a review of the judgment of the state court, petitioner, in fairness to this Court, and also to defendant, calls attention to some additional evidence which discloses that at most there were some conflicting issues of fact which might justify a jury, as triers of fact, into inferences favorable to defendant; also that to draw the proper inferences the jury, and not the court, should weigh the evidence and pass upon the credibility of the witnesses.

Defendant claimed that at the time of the accident there was in existence and in position an "impaired clearance sign" located at a point between the easterly rail of the Casein Spur Track and the northwesterly corner of the

Casein Co. building. The claimed location of this sign is indicated on the plat, Exhibit 1.

Engineer Buzard testified that the company maintains a sign there year in and year out, ever since he can remember, "and it says 'impaired clearance' on it" (R. 185). He last observed the sign two days before his deposition was taken (March 7, 1944), at which time it appeared like all the rest of the signs, which are kept well painted; that the sign was located on the east side of the track near the corner of the Casein building, and is about eight feet above the ground (R. 185-6). His construction of 'impaired clearance' was that it meant 'look out,' and "it would mean under standard clearance" (R. 194).

J. C. Brown testified that the "impaired clearance sign" shown on the plat, Exhibit 1, a year after the accident, is the same sign which he said was present the day the accident occurred. Brown further said, "I could not swear that that was the same sign, but I personallly think it is the same sign" (R. 222).

Melburn H. Estes, general yardmaster of defendant. This witness testified by deposition March 7, 1944, and also appeared and testified at the trial (R. 222-238, 322-341). He testified that the clearance sign, which is shown in Exhibit 11, (R. 124A), was in the same location as is shown, and over a period of ten years had been in the same location since he became general yardmaster, and that the signs are maintained and painted from time to time (R. 323-4).

H. B. Coburn, assistant superintendent of defendant, said there was a standard sign lettered either "restricted clearance" or "impaired clearance;" that the sign had been in existence for a period of several years prior to March 15, 1943, the day of the accident; that no change had been made, to his knowledge, with respect to either the location

or lettering of the sign following the accident; the signs consist of a rectangular board aproximately 15 inches x 28 inches, painted white with black lettering, erected on a post with the lettering 2½ in. to 3 in. in height, affixed to a post about 4x4 set in the ground, similar to a fence post. He did not believe that the company kept any record when the posts are replaced in case of deterioration, and did not know whether the posts were treated or painted; admitted that the soil in the vicinity of the Casein plant could be damp and moist and that weather causes a rotting condition in all wood; was uncertain whether the company had any standard with respect to the height which the sign should be above the ground or working level (R. 241-2).

Keith Murphy, witness for defendant, testified that "the impaired clearance sign which is shown in photograph, Exhibit 11, appears to be the same as the impaired clearance sign which was in the same position when he worked there during the summer and fall of 1942" (R. 308). A comparison of photographic Exhibits 11, 40, 41, 42, 43, 44 (R. 124A-326A) with the plat, Exhibit 1, is necessary in order to avoid deceptive location of the impaired clearance sign (if it was there at the time of the accident) because the plat demonstrates that the position of this sign was approximately 7½ feet west of the north side of the Casein building and approximately between 30 and 40 feet from the point where plaintiff was injured.

Plaintiff's Evidence as to the Sign. Mr. Ellis at no time prior to being injured had ever observed the impaired clearance sign, nor had anyone ever called his attention to it; he first observed the sign during the month of August, 1943, at which time it appeared like a new sign • • • the paint was fresh, there was no rot about the post or standard, and the bolts appeared like new bolts. The sign

was painted white with lettering in black and was not dirty. There was no grass but only plain dirt within an area of a foot or so around the base of the pole. The rainy season in Seattle extends from October to about the first day of May (R. 125-128).

Donald H. Christensen. This witness was formerly in the employ of defendant as a switchman and brakeman in the Argo Yards at Seattle; had worked in and about the Casein Spur and was familiar with that location and the general condition of the ground, the tracks and the ties of the Casein Spur Track (R. 146-7). Also employed approximately a week to ten days before Mr. Ellis was injured (March 15, 1943), and was there again about a week after the accident. He testified as follows:

> "Q. On these occasions that you worked *in* on the Casein Spur Track in March, 1943, can you tell us what the condition of the ground was in there, and the condition of the tracks and ties of that Casein Spur Track?
>
> A. Well, the ground is damp, the grass is 'pinnear,' always wet there unless the sun happens to shine. Outside of that it is quite murky, not a real solid bottom to it." (R. 147.)

With respect to the condition of the track and ties along the Casein Spur, he testified:

> "A. Well, you have tracks there narrower than the others . . . the rails themselves, I mean. The rails have been in there a long time. They do not seem to be too solid and some parts there were higher than the others.
>
> Q. Had you observed cars moving in and off the spur track?
>
> A. Yes, I have.
>
> Q. Tell the Court and jury what you observed with respect to the action or movement of the cars as they were moved in and off of that Casein Spur Track where it runs along the Casein building.

A. Well, of course, when you are head brakeman or pin puller you stay out of the switch. Of course, that means, when the car is going into the Casein Spur you would naturally observe it or watch it back in. Well, it rocks back and forth, the engine and car also, seeing that the track is rough, . . . and that the cars would do that even when being moved at a slow rate of speed in and off that track." (R. 147-8.)

During a period of three months preceding the accident this witness had been in and about the Casein Spur three or four times; was there probably a week or ten days before Ellis was injured, and was in the vicinity of the scene of the accident about a week after plaintiff was injured (R. 147). He further testified that the rainy season in Seattle extends from about December 1st until the latter part of April, and there was normal rainfall during the month of March up to March 15; that he had on some occasions observed cars moving in or off the Casein Spur Track to have a tendency to lean toward the Casein Building. He recognized defendant's Exhibit 11 as a photograph of the surroundings shown and, first observed the "impaired clearance sign" shown in the picture sometime in the month of May, 1943; that he had not observed the sign during the month of March, 1943, nor had his attention been called to such a sign at that time; that when he first observed the sign, it appeared the post was new and the ground surrounding it had been freshly turned; dirt had been tamped around the base of the pole, and the sign was newly painted, and the bolts did not show any signs of rust (R. 148-151).

There was some precipitation on March 12 to March 15, inclusive, as shown by the U. S. Weather Bureau records in Seattle. Witness Brown testified that this whole industrial site is part of the tide flats in South Seattle and is

what "I would call low and it has been filled in" (R. 211), Exhibit 14, (R. 248-A).

Defendant's yardmaster Estes admitted that "there is always less motion in a car when it is being run on a firm, level track than there is when it is being run on an uneven track with low and high joints" (R. 230).

Defendant's witness Keith Murphy testified that about two weeks before the trial of the case he was asked, while in Seattle, by Mr. Peterson, a claim agent for defendant, if he recalled the presence of the "impaired clearance sign." He had previously talked about the clearance sign shortly after he learned that plaintiff was injured, and when some member of his crew asked him if there was a sign there. He had never made any close observation of the sign, but at the time he talked with the claim agent he did not go to the scene of the accident or examine any photographs and cannot determine from the photograph, Exhibit 11, whether the sign is new or old (R. 308-310). He also testified that when a sign in that area is up for a number of years, it becomes weather beaten, and the paint would fade some, and he has observed old signs which had become rather indistinct. There is considerable rain and fog and dampness during the winter and spring months, and Puget Sound, which is salt water, is about two miles distant from the Casein plant, but he had not observed that such atmospheric conditions were hard on paint (R. 310-11). That the impaired clearance signs throughout the industrial district are placed on a level with a man's eye when he is standing on the step of a car, which would be about eight to nine feet from the ground (R. 311).

The westerly rail of the Casein Spur Track was at a higher level than the easterly track; this would cause cars to list in the direction of the building; defendant's yardmaster Estes testified that it is characteristic of railroad tracks that the rail on the outside of the curve is higher

than the rail on the inside of the curve; that such elevation would cause a car being moved in on the track to list toward the building, and if the tracks were uneven, having high and low joints, there would be side sway and lurching of a car, the extent depending upon speed and whether or not the track was firm and level (R. 230-31, 236-7).

Defendant, through its witness Keith Murphy, introduced various industrial records, Exhibits 15 to 39 inclusive. (R. 249-308). Similar records identified as Exhibit 20-a, Exhibits 45-46-47 were identified by defendant's yardmaster Estes. These were also industrial records. The purpose of introducing these records was to show that the plaintiff had worked with various switching crews in or about the vicinity of this industrial track more frequently than plaintiff himself had recalled. These occasions arose in the summer and fall of 1942, approximately six months or more before plaintiff met with this accident on the Casein Spur Track. The purpose of this evidence undoubtedly was to charge plaintiff with knowledge of the impaired clearance sign as well as knowledge of the narrow clearance. Plaintiff, however had testified that in working in the industrial district the full crew did not always accompany the engine into each and every industrial track. Some of this work was done at night. Of the various industrial records introduced, very few show that any cars were set in on the Casein Spur Track and these records did not show what the plaintiff was doing in respect to any such movements; there is no evidence that so large a box car was ever set in on that track, while plaintiff was one of a switching crew engaging in the work. At most, defendant's evidence was vaguely impeaching of plaintiff's credibility.

Witness Brown also testified as follows:

> "Since that accident has happened I am still working with that same engineer, and that has come up at times

about his getting hurt there, and when we go up there with a new man that is the first thing we tell them, about the curve in there, because Newt got hurt in there. That is sort of a jinx because everyone is careful switching in there." (B. of E., Q. 2513), (R. 221).

This testimony persuasively shows that defendant had knowledge of the danger and that there was necessity for warning.

Defendant's witness *Murphy* testified in respect to the industrial record and said:

"That he had different helpers and worked on the Casein Spur when Ellis was not a member of the crew; that the industrial records merely showed part of the work the crew does while working on any particular shift; that if he had not seen the industrial records it would be impossible for him to remember the number of times he had been in on the Casein Spur." (R. 307).

Defendant's yardmaster *Estes* testified that there was considerable open space on the westerly side of the track (R. 227). (Note: The extent of this open space is shown by plaintiff's Exhibit 1, the plat.) Also that the Casein Spur Track is in zone 5 and was taken care of by Union Pacific section men, and that this had been the practice for many years (R. 236).

Petitioner Ellis testified that signals for the movement made at the time of the accident could not be given to the engineer from the west side of the track except through the fireman; that he had on several occasions given such signals to the fireman, but not in the Casein Spur; that the practice of giving signals from the fireman's side of the engine would be followed only when it was known that it was dangerous to pass signals on the engineer's side (R. 102). He further said that he did not make any observa-

tions in respect to the Casein building and track, that he was not after objects or buildings, and that he was after a box car, (R. 119), and that at the time he walked over to the east side of the track said that his mind "naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it" (R. 134).

Jurisdiction of This Court

The jurisdiction of this Court is based upon Sec. 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925; Chap. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A. Sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by Writ of Error, any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had on any title, right, privilege, or immunity, especially set up or claimed by either party under the Constitution, or any treaty or statute, or commission held or authority exercised under the United States. The judgment of the Supreme Court of Nebraska sought to be reviewed was originally entered on July 20, 1945 (R. 342-355). A motion for rehearing was filed on August 8, 1945, within the time provided by the rules of the Supreme Court of Nebraska (R. 355). That in response to said motion for rehearing the Supreme Court of Nebraska, on October 13, 1945, ordered reargument of the motion for rehearing at a session of the Supreme Court of Nebraska commencing November 5, 1945; that reargument was heard on November 7, 1945; that thereafter the State Supreme Court, on March 22, 1946, denied the motion for rehearing, which is the date on which decision, judgment and decree of the Supreme Court of Nebraska in said

cause became final, and that the Supreme Court of Nebraska was the highest court of the State in which a decision could be had in said cause; that in said cause, petitioner especially set up and claimed a right under a statute of the United States, viz., the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, Act of April 22, 1908, Chap. 149, Sec. 8, 35 Stat. 65 (R. 376); which right was denied petitioner by such Supreme Court of Nebraska. Cases believed to sustain the jurisdiction are:

Lavender v. *Kurn*, — U. S. —, 90 Law Ed. 692. Decided March 25, 1946;

Seago v. *New York Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

Jenkins v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

New York Central R. Co. v. *Marcone*, 281 U. S. 345;

Puget Sound Power & Light Co. v. *County of King*, 264 U. S. 22;

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 Law Ed. 322;

Bailey v. *Central Vermont R. Co.*, 319 U. S. 350, 87 Law Ed. 1444, 63 Sup. Ct. Rep. 1062;

Tennant v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 Law Ed. 322;

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 Law Ed. 1683;

Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 Law Ed. 490.

Questions Presented

The questions presented by petitioner's petition herein for a Writ of Certiorari are:

1. Whether, in an action against a railroad carrier under the Federal Employers' Liability Act (45 U. S. C. A.,

Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, Stat. 65) to recover damages for personal injuries sustained while in the employ of defendant railroad, performing duties in the course of his employment, the evidence relating to the proximate cause of such injuries sufficed, under the applicable decisions of this Court, to warrant the submission to a jury of the issues of negligence either in one or more of the following particulars:

(a) Was defendant negligent in failing to provide and maintain for plaintiff a reasonably safe place of work?

(b) Was defendant negligent in failing to warn plaintiff of the dangerous condition which subjected him to personal injury?

(c) Was defendant's locomotive engineer, in proceeding with the movement (engine shoving box car), negligent in proceeding with the movement, the result of which was to squeeze and crush plaintiff between the building wall and the side of the box car when approximately half of the box car had gone by plaintiff?

2. Whether, in an action under the Federal Employers' Liability Act, to recover damages for personal injury of plaintiff, a switch foreman employed in interstate commerce and admitted by defendant to be within the remedial protection and benefit of the Act, the action of the highest court in a State in which a decision could be had in said cause, in ruling that plaintiff made no case for the jury against his employer for failure to provide and maintain a safe place to work, and without taking into consideration undisputed testimony favorable to plaintiff, was erroneous and not in accord with the applicable decisions of this Court. There was substantial evidence that the place of work furnished plaintiff was dangerous and unsafe and that his injury was caused by such dangerous and unsafe place of

work, and also that defendant was negligent in respect to other acts and omissions which concurred in proximately causing injury to plaintiff. The evidence proving such place of work was dangerous and unsafe was clear, cogent and convincing. The evidence showed that where the track curved around the building there was one spot approximately five feet above the ground where the side of the box car, midway between its ends, would come within ten inches of the building wall. This condition existed longitudinally for approximately one foot of space along the building wall at a point well above the ground (probably beginning 4 or 5 feet above). The narrow clearance at this point was due to the short and sharp curve of the track and the fact that the apex of the curve and this spot of the building were opposite each other; the building was on the inside of the curve in the track, and a long and large box car in rounding the curve would crowd toward the building to such an extent that one occupying the position plaintiff did, if unaware of the condition, was likely to become caught and squeezed between the car and the building when the middle of the car would be approximately opposite the apex of the curve. Had Ellis been one foot either north or south of this dangerous spot the injury would not have occurred. This condition had existed for many years. Plaintiff had no knowledge of it. He had not been warned against the danger. The danger was obscure and latent to a casual observer.

3. Whether, in an action under the Federal Employers' Liability Act, was the action of the highest State court in which a decision could be had erroneous and not in accord with the applicable decisions of this Court, in reversing the judgment in favor of plaintiff in the lower court, which judgment had been entered upon the jury's verdict in favor of plaintiff, and in dismissing the action,

merely because it appeared that if plaintiff had performed his work on the other (westerly) side of the track this accident would not have occurred, where the evidence showed that the usual and customary practice on the Casein Spur Track was for the crew to work on the engineer's side of the track, which was the easterly side of the track, that side of the track next to the Casein building.

4. Whether, in such an action as this under the Federal Employers' Liability Act, the action of the highest court in a State in which a decision could be had in said cause, in ruling that plaintiff made no case for the jury, and in holding that he alone was guilty of negligence which was the sole cause of his injury, was erroneous and not in accord with the applicable decisions of this Court; whether because the work in hand could have been performed more safely on the westerly side of the track than on the easterly side of the track, may the master escape liability in the absence of warning, and rules against use of the dangerous side? In other words, in a case such as this, may the master escape liability where he provides and maintains a place of work on each side of a railroad track, one side of which is more dangerous than the other side, and where he sanctions and permits the use of the dangerous side of the track by long continued custom and practice, without giving adequate and sufficient notice or warning of the precise or specific danger, and still be exempt from a charge of negligence; and can it be justly held that the employee alone was negligent in not selecting the safest side?

5. Whether, in this action, the decision of the Supreme Court of the State of Nebraska was erroneous and in conflict with the applicable decisions of this Court in holding, in effect, that there was no negligence on the part of defendant because plaintiff was negligent and voluntarily assumed the risk. A comparison of the two opinions of the Supreme

Court of Nebraska, *Ellis* v. *Union Pac. R. Co.*, 146 Neb. 397, 19 N. W. (2d) 641; *Ellis* v. *U. P. R. Co.*, 22 N. W. (2d) 20, indicate that the Supreme Court of Nebraska was wholly at sea in respect to any comprehensive understanding of the applicable decisions of this Court, as related to the issues involved.

Reasons Relied on for the Allowance of the Writ

I

This Action is brought by plaintiff under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 1, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). His employment by the railroad in interstate commerce and interstate transportation was alleged in his petition and it was stipulated between the parties at the trial that he was subject to and within the provisions of the Act. At the time of his injury on March 15, 1943, he was in the employ of defendant as switch foreman, in charge of a switching and engine crew, engaging in respotting a box car on the Casein Spur track. The salient facts and circumstances of the movement and injury are set forth in the "Summary Statement" of the matter involved. The day he was injured was the first time he had ever worked as foreman in or about the Casein Spur track, which was located in Seattle, Washington; it was a dead end track which would hold not to exceed five or six cars; the dead end of the track was at its southerly end and the only way to get into this track was from the northeasterly end, where it connected with the Myrtle Street track; the necessary movements of the engine and car involved, to accomplish the purposes intended, are adequately described in the Summary. The head, or front of the engine, faced northerly. The tender, and the lone box car which was coupled to the tender, faced southerly. The movement was a back-up movement; the engine and tender

shoving the box car in a southerly direction. The engineer in his cab, looking out of the side window, was on the easterly side of the engine. The Casein building was immediately east of the Casein Spur track. Plaintiff, shortly previous to the start of this back-up movement, crossed to the engineer's side of the track some distance to the south of the box car and from that time carried on his duties on the easterly side of the track, and walked in a southerly direction between the Casein Spur and the Casein building until he came to a stop at the place where he was injured. While in this position about half of the box car went by him; it was at this time that the middle of the car caught up to him that he was squeezed and crushed between the side of the car and the building wall. While standing at the place where he was injured he kept in contact with the engineer, who was to the north of him, and also tried to make contact with his switchman helper, Brown, who was supposed to be at the first loading platform of the Casein building, this platform being located some distance to the south of where plaintiff was standing. The engine and car was moving at a speed of approximately two miles per hour. Plaintiff did not know or realize that he was standing in a position of danger; he assumed that the car would clear him; the forward end of the car and nearly half of it went by him while he was looking in the direction of where his helper switchman, Brown, was supposed to be, in order to make contact with him, and not being able to discover Brown, turned his head in the opposite direction to contact the engineer; it was just as he turned his head that the middle side of the box car caught him and crushed and squeezed him against the building wall.

This dangerous place existed because the curvature of the track was such that the apex of the curve was approximately opposite the place where plaintiff was standing and the track was so located and constructed that when the middle

of this box car (50 ft. 6 in. long, 10 ft. 7 in. wide) approximated the apex of the curve, the side of the box car came within 10 inches of the wall of the building where plaintiff was standing at the time he became caught, squeezed and crushed. No danger sign or notice was posted at or in the immediate vicinity of this danger spot. There was nothing to indicate to a casual observer that here was a place of danger; no trap for the unsuspecting could have been better concealed than was this. This condition apparently had existed for many years; defendant exercised dominion over this track. It was under the supervision and control of its roadmaster. It was maintained by defendant and its section men made repairs, if any were made. It was within defendant's switching zone and it alone carried on switching operations thereon. Its roadmaster and yardmaster and assistant superintendent were all familiar with the conditions and had been for years. It knew, or should have known, of the existence of this danger spot; it should have given plaintiff notice and warning thereof. It failed to do so.

On the Casein Spur track it was the usual custom and practice of the switching crew to work on the engineer's side of the Casein Spur track. Such custom and practice had existed for many years, until after plaintiff was injured. Engineer Buzard said that during his many years experience on the Casein Spur track he had never observed such a crew work on the other side of the track but that they always worked on the engineer's side. The evidence, as a whole, with the inferences fairly and reasonably arising therefrom, was such as tended strongly, if not conclusively, to show that defendant's negligence, either in whole or in part, proximately caused injury to plaintiff.

Nevertheless, the Supreme Court of Nebraska, in its opinion in said cause (*Ellis* v. *U. P. R. Co.*, 22 N. W. (2d)

20) ruled that plaintiff failed to make a case for the jury, and ruled that the submission of the case to the jury would invite a verdict based upon conjecture or speculation, and that there was no substantial evidence to sustain a finding that defendant was negligent. Such ruling is erroneous and not in accord with the applicable decisions of this Honorable Court, holding that on the question whether a case is one for the jury the evidence should be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that the credibility of witnesses and the weight to be given to their testimony are for the jury; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the court, but one of fact for the jury.

II

In this case petitioner claimed the right to recover under the Federal Employers' Liability Act for injuries sustained in consequence of the negligence of defendant railroad in failing to provide and maintain a reasonably safe place of work for its employee, this petitioner. The evidence clearly showed that at, and immediately prior to the time of his injury he was working on the easterly side of the Casein Spur track (the engineer's side), where it was the usual and customary place for one performing the work he was engaging in to work; that on this side of the track, along the course which a switchman might reasonably be expected to walk or stand in the performance of the duties which petitioner was engaging in, there was an extremely dangerous place which had been in existence for many years; the danger was one that was obscure and hidden and one not readily discoverable to a casual observer, and particularly to one engaged in the performance

of duties which centered or distracted the attention of plaintiff to the engineer in one direction and his helper switchman in another direction, for the purpose of spotting the box car to its proper location at the loading platform of the Casein building. It is undisputed that this place was one of danger and the evidence is overwhelming that petitioner had no knowledge, notice or warning of it. On the record, and the applicable decisions of this Court, the issue was for the jury, and the Supreme Court of Nebraska was in error in ruling otherwise.

III

On substantial evidence in this case the issue of the negligence of defendant's engineer and such negligence as a proximate cause of the injury to plaintiff was for decision by the jury, under the applicable decisions of this Court, and the Supreme Court of Nebraska erred in ruling to the contrary.

IV

The Supreme Court of Nebraska ruled that petitioner was guilty of negligence which was the sole proximate cause of his injury. Such ruling is in conflict with the evidence and the applicable decisions of this Court.

V

The Supreme Court of Nebraska ruled, in effect, that plaintiff assumed the risk of his injury, that he alone was negligent and that defendant was not negligent; such ruling was not justified by the evidence and contravenes the applicable decisions of this Court.

VI

The Supreme Court of Nebraska, by its decision and judgment in this cause, denied petitioner a right specially

set up and claimed by him under the Federal Employers' Liability Act, viz, the right to have his case submitted to the jury on his claim and theory that his injury, while employed by Respondent in interstate commerce and interstate transportation, resulted from the negligence of Respondent, when there was evidence adduced rightfully engendering that conclusion. It is respectfully submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its Writ of Certiorari herein.

Prayer of Petitioner

Wherefore, Petitioner prays that a Writ of Certiorari be issued by this Court directed to the Supreme Court of Nebraska to the end that the decision and judgment of the Supreme Court of Nebraska in said cause, *Newton W. Ellis, Plaintiff and Appellee,* v. *Union Pacific Railroad Company, Defendant and Appellant,* No. 31889, be reviewed by this Court, as provided by law, and that upon such review said decision and judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

Dated: June 14, 1946.

NEWTON W. ELLIS,
Petitioner.

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Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 320

NEWTON W. ELLIS,

Petitioner,

vs.

UNION PACIFIC RAILROAD,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinions of the Supreme Court of Nebraska in said cause of *Newton W. Ellis, Plaintiff and Appellee, v. Union Pacific Railroad Company, Defendant and Appellant,* which petitioner here seeks to have reviewed, is reported in: 146 Neb. 397, 19 N. W. (2d) 641; and — Neb. —, 22 N. W. (2d) 20; and appear on pages 342-355 and pages 377-390 of the record filed herewith.

Statement of the Case

The essential facts of the case are believed to be fully stated in petitioner's Petition for a Writ of Certiorari, and in the interest of brevity are not reported here. Ref-

erence will be made to such facts on the points involved in the course of argument, which follows. Reference to certain facts and evidence not contained in the summary may be referred to in the argument for the purpose of aiding this Court in visualizing the manifest and grievous errors of the Supreme Court of Nebraska.

Specifications of Error to be Urged

The Supreme Court of Nebraska, in its opinion in said cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, Union Pacific Railroad Company.

(2) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the claim and theory of petitioner that Respondent, Union Pacific Railroad Company, negligently failed to provide and maintain for petitioner a reasonably safe place of work.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the claim and theory of petitioner, that respondent, Union Pacific Railroad Company, negligently failed to furnish its employee, petitioner Ellis, with a reasonably safe place to work, which negligence, in whole or in part, proximately resulted in petitioner's injuries.

(4) In holding and deciding that to submit the case to the jury upon the theory that petitioner's injury was caused, in whole or in part, in consequence of negligence on the part

of respondent, Union Pacific Railroad Co., in not providing and maintaining for petitioner, its employee, a reasonably safe place of work, would invite a verdict based on speculation and conjecture.

(5) In holding and deciding that to submit the case to the jury on the theory that Respondent, Union Pacific Railroad Company, negligently failed to warn petitioner of the danger which resulted in injury to him was without substantial support of evidence, and would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that the evidence was insufficient to support a finding by the jury that petitioner's injury resulted, in whole or in part, in consequence of negligence on the part of Respondent's servant, the locomotive engineer, G. J. Buzard, and in holding that the submission of such issue would invite a verdict based on speculation or conjecture.

(7) In holding and deciding that petitioner alone was guilty of negligence and that his negligence was the sole cause of his injury, and in denying him a recovery of damages under the Federal Employers' Liability Act on such ground.

(8) In holding and deciding that the burden of proof rested upon petitioner to establish that he did not know that he was in a place of danger and that he could not make discovery of such danger in the exercise of ordinary care on his part, and in denying him a recovery on such ground.

(9) In holding, in effect, that under the facts and circumstances petitioner was an insurer of his own safety, and in denying him a recovery on such ground.

(10) In holding, in effect, that if the master provides two places of work (each side of the track), one of which is

safe and the other unsafe, that in such event the risk is that of the employee and if perchance he takes the unsafe side he cannot recover.

(11) In holding and deciding, in effect, that Respondent was not chargeable with negligence because plaintiff was guilty of negligence and assumed the risk of his injuries, and in denying him a recovery on such grounds.

(12) In reversing the judgment obtained by petitioner in the trial court and dismissing his action.

Summary of the Argument

(1)

The evidence adduced at the trial of said cause of *Newton W. Ellis* v. *Union Pacific Railroad Co.* on the issue of respondent's liability for the injury of petitioner under the Employers' Liability Act as for negligence on the part of respondent in failing to provide and maintain for petitioner a reasonably safe place of work amply sufficed to make that issue one for the jury; and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

Lavender v. *Kurn*, — U. S. —, 90 L. Ed. 692. Decided March 25, 1946;

Bailey v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. Rep. 1062;

Tennant v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683;

Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 L. Ed. 490;

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 L. Ed. 322;

Seago v. *N. Y. Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

Jenkins v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

Choctaw O. G. R. Co. v. *McDade*, 191 U. S. 64, 48 L. Ed. 96.

(2)

The evidence adduced at the trial of this cause on the issue of respondent's liability for the injury to petitioner under the Employers' Liability Act as for negligence on the part of respondent in failing to warn petitioner of and against the danger which resulted in his injury, amply sufficed to make that issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

Kanawha & Michigan R. Co. v. *Kerse*, 239 U. S. 576, 60 L. Ed. 448.

(3)

The evidence adduced at the trial of this cause on the issue of respondent's liability for the injury to petitioner under the Employers' Liability Act as for negligence on the part of respondent in consequence of the negligent acts and omissions of its servant, the locomotive engineer, G. J. Buzard, amply sufficed to make that issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

Tennant v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683.

(4)

The evidence adduced at the trial did not suffice to prove conclusively and as a matter of law that petitioner was guilty of negligence, or that such negligence was the sole cause of his injury, and the Supreme Court of Nebraska erred in holding that there was such negligence and that the same barred petitioner from recovering a judgment in his favor.

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683;
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;
U. P. R. Co. v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751.

(5)

This Court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a federal right by the opinion, decision and judgment below.

G. N. R. Co. v. *State of Washington*, 300 U. S. 154, 81 L. Ed. 573;
United Gas Public Service Co. v. *State of Texas*, 303 U. S. 123, 143, 82 L. Ed. 702;
Chicago G. W. R. Co. v. *Rambo*, 298 U. S. 99, 80 L. Ed. 1066.

Argument

This is an action under the Federal Employers' Liability Act (45 U. S. C. A. sec. 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65) including (U. S. C. A. Sec. 53 of that Act,

sec. 3, 35 Stat 66), and (U. S. C. A. title 45, sec. 54, and the Act of August 11, 1939, c. 685, sec. 1, 53 Stat. 1404), brought by your petitioner, Newton W. Ellis, to recover damages for personal injuries charged to have been proximately caused by the negligence of the respondent, as set forth in the Petition, namely,

(a) Failure to provide and maintain for its employee, the petitioner, a reasonably safe place of work;

(b) Negligence of respondent in failing to warn petitioner of and against the danger to which he was subjected;

(c) Negligence of respondent's servant, locomotive engineer, G. J. Buzard.

The pertinent provisions of the Employers' Liability Act are:

(1) "Every common carrier by railroad, while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . and such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

(2) ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

(3) ". . . such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

(1)

Negligence and Its Proximate Cause of Injury in Failure to Provide and Maintain a Reasonably Safe Place of Work, Proven by Substantial Evidence

Petitioner submits that the evidence adduced at the trial of the cause in the District Court of Douglas County, Nebraska on the issue of respondent's liability under the Employers' Liability Act for injury to petitioner, its employee, as for negligence on the part of respondent, as shown by the record of the cause in the Supreme Court of Nebraska, filed herewith, amply sufficed to make the issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have the issue submitted.

At and immediately prior to the time that petitioner was injured he was on duty as a switch foreman in the switching zone of respondent in the city of Seattle, state of Washington. On March 15, 1943, at about 6:00 o'clock P. M. (Pacific Standard time), or 7:00 o'clock (Pacific war time) on an industrial track known as Casein Spur Track, petitioner, as foreman of a switching crew, participated in the work of re-spotting a box car on the Casein Spur Track. The place and detail of work and circumstances under which the petitioner met with injury are described in the Summary Statement of the Petition for Writ of Certiorari with appropriate references to the record. A plat, Exhibit 1, drawn to a scale of 1 in. to 20 ft., correctly shows the *locus in quo* of the Casein Spur Track and the Casein building (R. 26A.) This plat also shows compass directions, and it is established by the plat, and other evidence not in dispute, that the Casein Spur Track extended in a northerly and southerly direction along the Casein building on the westerly side. The easterly rails of this track at the point

where petitioner was injured, and for some considerable distance both north and south of this point, were located within approximately 57 inches of the westerly wall of the Casein building (R. 26A). A portion of the building wall was of diagonal construction and the track curved sharply around this diagonal wall (R. 26A). The construction and location of the building and track, with respect to each other, was such that if a large box car (50 ft. 6 in. long and 10 ft. 7 in. wide) was being moved over and around the curve of the track, the middle of the car would come within 10 inches of the building wall, over a longitudinal space of approximately 12 inches at a point approximately 4 ft. above the ground, due to the fact that the apex of the curve was opposite this place on the building wall. Thus, when the middle of the car (meaning the middle thereof between the ends of the car) arrived at the apex of the curve there was created the situation and condition in which a switchman might be trapped, squeezed, and crushed between the side of the car and the building, as was Ellis.

Petitioner Ellis was not a railroad hand of long experience; he had a grade school education with one year in high school, following which he engaged in farming and followed the trade of a plasterer for about fifteen years. About the year 1922 or 1923 he was employed by Southern Pacific as a brakeman for about one year; in April, 1942 he entered the service of respondent as a brakeman and switchman, working mostly in the Argo Yards where the work consisted mostly in doing such switching work as was necessary in making and breaking up trains. At the time he was injured he was engaged in industrial work outside of the Argo Yards which consisted of picking up loaded cars or taking empty or loaded cars to or from industries, and first engaged in such industrial work in the

summer and early fall of 1942 as a helper switchman (R. 30). He worked on different shifts at various times while he was a helper and engine foreman, starting with a night shift while on the extra board, and was first promoted to an engine foreman in the month of February, 1943 (R. 31). His promotion was due probably more to the shortage of skilled and seasoned engine foremen or men qualified for such a position, because of the war emergency, rather than to any experience or training on his part. Prior to the time of the accident he had never worked either as a switching foreman or switch helper *in* on the Casein Spur Track, and had never participated in such a movement on the Casein Spur Track as was in operation at the time he was injured (R. 32). The day of the accident was the first time in a period of five or six months that petitioner had occasion to work in or about the immediate vicinity of this industrial zone. There had neither been occasion nor opportunity for him to make other than casual observations in relation to the general conditions existing in and about the Casein Spur Track. Shortly before the accident occurred petitioner crossed from the westerly side of the Casein Spur track to the easterly side thereof, which brought him into the space between the track and the Casein building. The purpose of so doing was to be on the engineer's side of the engine so that petitioner would be in a position to give, receive or transmit signals to or from his helper switchman, who was also working on the east side of the track; switching movements are made according to signals and it was important and necessary that petitioner, the engineer, and switch helper Brown coordinate their work and efforts so that the work in hand might be efficiently and safely carried out. It was of the utmost importance and mandatory for the engineer to keep in contact with petitioner at least until the engineer could make contact with switchman Brown. How important and im-

perative that duty was is aptly illustrated by the testimony of the engineer, when he said that if Ellis disappeared from his view that would be a "stop signal." At the time Ellis crossed to the easterly side of the spur track no cars were on the Casein Spur and of course he could see generally how the track was located with respect to the Casein building; he could also see that the track curved; he did not know the degree of the curvature; and while, of course, he had an eye view of the general amount of clearance between the easterly rail and the Casein building, there was nothing about that which would necessarily impose on a person of ordinary prudence, knowledge that over a space of about one foot in length at some point in the course of the curve there was a spot between the easterly rail of the track and the westerly wall of the building where a person could be trapped and crushed if he happened to be standing in that spot at the precise time that the middle of a long box car reached the apex of the curve. It was this condition which was unknown to petitioner and he had not been warned of it. Had petitioner been skilled in trigonometry and had he been furnished with proper instruments for measuring distances, and had he been possessed of sufficient data he might have been able to figure out what would happen if he remained in the position he was in at the time he became trapped. The danger was not obvious or apparent to the naked eye. Petitioner did not realize or appreciate that he was in a place of danger and naturally assumed that his place of work was safe. That which made this place unsafe were certain factors and conditions which had to merge to produce what occurred. The danger was an obscure, latent and hidden one; petitioner was wholly unaware thereof. Respondent railroad knew, or in the exercise of ordinary care should have known thereof and should have remedied the condition, or, if that was impractical or impossible, it should

have given effective notice and warning of the danger. It is undisputed on the record that petitioner at no time was notified of or warned against this danger and hazard which resulted in his injury. Respondent sought on circumstantial evidence to prove that petitioner had knowledge of the danger. It laid considerable stress on the alleged fact that it had erected and maintained an "impaired clearance" sign. Evidence on the part of the petitioner raised a doubt as to whether this sign was either in the position claimed, and, if there, whether it was in legible condition. The sign itself,—set between eight and nine feet above the ground, where it would be about level with the head of a man who was riding the lower step on the side of a car, and would also be in easy view of the eye of a locomotive engineer riding in the engine cab. The purpose of the sign was undoubtedly to serve as a warning to employees riding the side of a car; it probably was also a warning to the engineer to be on the alert and to exercise care to avoid injury to the members of a switching crew who might be working either on the ground or riding a car on the easterly side of the Casein Spur. This sign was utterly inadequate as notice or warning of the specific danger which caused injury to petitioner. Assuming, for the sake of argument, that the sign was in the position claimed, it was far removed from the point of danger. The plat in evidence shows that it was between 30 and 40 feet from the danger spot. If the sign had said "No Clearance," a more persuasive claim of warning might exist. This particular sign, if maintained in legible condition and if brought to the notice and knowledge of members of a switching crew who had work to do on the Casein Spur, could hardly be construed as a prohibition against working in the space between the Casein Spur Track and the Casein building. The danger was so obscure as to require specific warning, which was not

given. That this place of work was unsafe is undisputed. That it was a proximate cause of petitioner's injury cannot be denied.

Giving to petitioner the full benefit of all reasonable inferences deducible from the evidence that are favorable to him, it seems clear that the issue of respondent's negligence was amply supported by substantial evidence which not only justified but compelled submission of that issue for determination by the jury, and that the Supreme Court of Nebraska was clearly in error in holding otherwise. To sustain this contention petitioner cites and quotes from a few of the more recent decisions.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 453, 63 S. Ct. 444, 451, this Court said:

> "Where the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

In *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. ed. 1444, 63 S. Ct. 1062, this Court, after commenting that the jury is the tribunal to decide issues of fact, where fair minded men might reach different conclusions, (i. e. draw different conclusions), even from uncontroverted evidence, as well as issues involving controverted evidence, went on to say, (319 U. S. 354, 87 L. ed. 1447, 63 S. Ct. 1064):

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of plac-

ing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

This Court in (*Bailey* v. *Central Vermont R. Co., supra,* page 353) commenting on the duty of the master to provide and maintain for the servant a reasonably safe place of work, said:

"As stated by this Court in the Patton Case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy and that in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery' . . . It is that rule which obtains under the Employers' Liability Act. . . . That duty of the carrier is a 'continuing one' . . . from which the carrier is not relieved by the fact that the *employe's work in the place in question is fleeting or infrequent.*" (Italics supplied.)

The reasoning which impelled this Court in the *Bailey* case, *supra,* to hold that the lower court was in error in withdrawing the issue of negligence from the jury applies with equal force to the case at bar.

In the case *of Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. ed. 520, 524, this Court said:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof may equally support inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn

by the jury. It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which is considered most reasonable . . . That conclusion, whether it relates to negligence, causation, or any other factor, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable. Upon an examination of the record we cannot say that the inferences drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus, to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

In the recent case of *Lavender* v. *Kurn*, et al., *supra*, decided by this Court March 25, 1946, the salutary rules of this Court as pronounced as determinative and controlling as to when the issues in an action under the Employers' Liability Act should be submitted to a jury for determination, and that the jury's verdict in favor of an injured employee should not be lightly taken away have been reiterated and reaffirmed. We quote from *Lavender* v. *Kurn*, et al., *supra*, as follows:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The

jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey *v.* Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant *v.* Peoria & U. P. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, "Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act," 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Notwithstanding the rather numerous decisions of this Court in cases arising under the Employers' Liability Act since the 1939 Amendment of that Act, some state courts of last resort appear to have had difficulty in applying to the evidence and facts in these cases under the Employers' Liability Act, either practically or judicially, the applicable de-

cisions of this Court in determining whether or not the evidence and the law suffice to make a submissible case for the jury. That clearly appears to have been the barrier which the Supreme Court of Nebraska was unable to hurdle. A comparison of the two decisions of that Court in the case at bar manifests the utter confusion and inability of that Court in appraising the petitioner's case in accordance with the applicable decisions of this Court. While in its second decision the Supreme Court of Nebraska has given considerable lip service to the federal rules of law as to the basis for submission of a case to the jury (and by this statement we neither mean nor intend any disrespect for that Court), it has in fact and in effect reversed the rule in favor of respondent and against petitioner and has given the benefit of conflicting inferences to respondent instead of to petitioner. The two decisions of the Supreme Court of Nebraska have led to some startling pronouncements of law which are incompatible with the applicable decisions of this Court under the Employers' Liability Act and which are in conflict with recent trends in judicial interpretations in railroad cases under the Federal Employers' Liability Act. More specific analysis of the opinions of the state court will be made under another heading.

Defendant Cannot Escape its Primary Duty to Provide and Maintain for its Employees a Reasonably Safe Place of Work on the Pretext or Theory that an "Engineering Problem" was Involved. On the Facts and Circumstances of this Case there was no Engineering Problem

Choctaw R. Co. v. *McDade*, 191 U. S. 64, 67, 48 L. Ed. 96;
Texas & Pac. R. Co. v. *Swearingen*, 196 U. S. 51, 49 L. Ed. 382;
Clay v. *Chi., Mil. & St. Paul R. Co.*, 104 Minn. 1, 115 N. W. 949.

Defendant exercised dominion over the Casein Spur Track and is chargeable with negligence in placing and maintaining said track in dangerous proximity to the Casein Company building. No technical engineering problem was involved in the location of the Casein Spur Track with respect to the Casein building; even an engineering problem is not a defense if negligently solved. On the record this case involved no engineering problem of technical character. The matter of locating, or relocating, this short single spur track was but a simple task. As Judge Hammond said, in 112 Fed. 888, 50 C. C. A. 591, approved in *Choctaw O & G R. Co.* v. *McDade*, 191 U. S. 64, 67, 24 S. Ct. 24, 25, 48 L. Ed. 96:

> "It (the matter of erecting a water spout so as to provide a safe clearance) is so simple a task, one so devoid of all exigencies of experience, necessity, or convenience, so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

In the case at bar, there was no showing of necessity requiring the maintenance of so dangerous a place as where Ellis was caught and trapped. On the undisputed facts it is plain that there was neither justification nor necessity for permitting such a dangerous condition to exist.

In *Bimberg* v. *N. P. R. Co.*, 217 Minn. 187, 14 N. W. (2d) 410-419, the Minnesota Supreme Court, following the applicable decisions of this Court in a case arising under the Federal Act, said:

> "Local useage and general custom, either singly or in combination, will not justify or excuse negligence. They are merely fox holes in one of the battlefields of the law, providing shelter but not complete protection against charges of negligence. The generality of its plan of construction for tressels or bridges cannot ex-

cuse a railroad company from responsibility for negligence in its construction. Such plan of construction, commonly followed and 'fortified', as defendant insists, 'by many years of successful railroad operations' may be evidence of due care, but it cannot avail to establish as safe in law that which is dangerous in fact."

A clear and comprehensive statement of law, as believed by us to be applicable to this case, is to be found in Vol. 4, Dunnell's Minn. Digest, page 377, Sec. 5872:

"Duty of railway companies as to tracks, etc.—In general—A railway company is bound to exercise ordinary or reasonable care to so construct and maintain its roadbed and tracks that they will be reasonably safe for its servants. While a railway company has a right to construct its own road and to solve its own engineering problems in accordance with its own views and to determine what structures it will erect and at what places, it may not, without liability, thereby violate rules of law for the protection of passengers and employees. It is the duty of a railway company to place its structures at a reasonably safe distance from its tracks, so as not to be dangerous to brakemen and other operatives upon the train, or to warn them of such dangers if they exist."

The above rule has support in the following decisions:

Clay v. *Chi., Mil. & St. P. R. Co.,* 104 Minn. 1, 115 N. W. 949;

Choctaw, O. & G. R. Co., v. *McDade,* 191 U. S. 64, 48 L. Ed. 96;

Texas & Pac. R. Co. v. *Swearingen,* 196 U. S. 51, 49 L. Ed. 382.

The *Clay* case, *supra,* involved the proximity of a platform to a track; the result of the action was in favor of plaintiff. The Minnesota Court said:

"This case involved no engineering problem of technical character. As Judge Hammon said in 112 Fed.

888, 50 C. C. A. 591, approved in Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 67, 24 Su. Ct. 24, 25, 48 L. Ed. 96: 'It (the matter of erecting a waterspout so as to provide a safe clearance) is so simple a task, one so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence.' And see 4 Thompson, Neg. #4315. The authorities subsequently considered in connection with assumption of risk and contributory negligence fully sustain this view. It is to be immediately noted that Tuttle *v.* Detroit, G. H. & M. Ry. Co., supra, was called to the attention of the Supreme Court in argument in Texas & Pac. Ry. Co. *v.* Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382. A conclusion consistent with plaintiff's right to recover here was none the less reached."

In the *Texas & P. R. Co.* v. *Swearingen* case, *supra*, the Court said:

"A railway company cannot be said as a matter of law to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than two feet for the movements of a switchman between the side of a freight car and the scale box when encumbered with a lantern for signal purposes.

"Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box."

In *New York, C. & St. L. R. Co.* v. *Peele* (1929), 164 N. E. 705, 88 Indiana App. 532, certiorari denied, 279 U. S. 842, 73 L. ed. 988, it was held:

> "That placing of tracks in dangerous proximity was due to the presence of buildings was not sufficient excuse therefore."

It is earnestly contended by your petitioner that there was involved in this case no engineering problem which would justify the Court in using it as a shield either to protect or insulate the railroad against its duty to provide and maintain for its employees a reasonably safe place of work. One of the early cases of this Court which appears to be about the first decision of this Court in which the "engineering problem" was discussed by this Court is the case of *Tuttle* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 122 U. S. 189, 30 L. ed. 1115. In that case this Court said:

> "Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."

This statement, however, can hardly be accepted as a hard and fast rule applicable in every case regardless of facts and circumstances, because the Court further said:

> "That the interest of railroad companies themselves is so strictly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc."

And following that statement the Court said:

> "It must be an extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees."

The Court then went on to say:

> "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another; and anyone who enters the service of a railroad company connected with the moving of trains, assumes the risk of that condition of things."

Two of the Justices dissented from "the proposition that the railroad company owes no duty to its employees in regard to the sharpness of the curves, of the track in the yards in which they are employed."

The most that can be said for that decision is that it represented the public policy at that time of insulating the employer from the "human overhead," at a time when assumption of risk was a valid defense.

The case of *Toledo, St. Louis & Western Ry. Co.* v. *Allen*, 276 U. S. 165, 72 L. ed. 513, was decided on the theory of assumption of risk, and while it contains some dictum on the engineering problem, the Court said:

> "Having regard to plaintiff's knowledge of the situation, it is clear that the evidence, when taken most favorably to him, is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks."

Allen, however, was employed as a car checker in a rather busy yard and was injured between tracks, one of which was occupied with cars and on the other of which cars were being moved; there actually was a clearance of two feet and nine inches, without considering the grabirons on the

cinder cars which projected four and one-half inches from each corner. The Court said:

> "While this space was sufficient to enable plaintiff to keep out of the way of moving cars, the danger attending his work would have been lessened if the distance between the tracks had been greater."

Other cases cited by defendant involved semaphores, mail trains, and platforms; these cases are all distinguishable on the facts and circumstances peculiar to each; some of the platform cases are distinguishable because of the fact that the employee took a position between the platform and the side of the car, which was obviously dangerous and was not intended as a place of work, and, further, because the employee knew of the risk and assumed it, or was guilty of contributory negligence when such negligence barred a recovery.

Of all the cases cited by appellant, that of *Davis* v. *Hand*, 290 Fed. 73 (C. C. A. 8), is most nearly analogous, but still is so far removed from the facts and circumstances of the case at bar as to be of no controlling force and effect. In that case it appears that plaintiff had knowledge of the insufficient clearance; that it was not necessary for him to ride on that side of the car which caused him to be crushed between the car and a coal bin adjacent to the track; the track was straight, he was familiar with his surroundings, and familiar with the operation and movement; one of the grounds alleged for recovery was close clearance between the track and the coal bin, a clearance so close that it would not clear a man on the side of a passing car. The Court said:

> "Whether or not this is negligence depends upon facts of each case. The evidence discloses here that the spur was not a busy one. It was not a through track and was not used for general switching, or for

> any purpose other than for storing the occasional car of coal that stood there until unloaded. The deceased had several times performed the only operation for which the track was used, and must have been thoroughly familiar with the clearance and other physical surroundings. It is not contended that it was necessary for the plaintiff to ride on the side of the car. For these reasons we hold that in this case there was no negligence on the part of the defendant and no question for the jury."

This case was decided long before the Federal Employers' Liability Act was amended in respect to assumption of risk, and it is inferable that the result was probably based upon assumption of risk.

In *Houston & T. C. R. Co.* v. *Robins* (Tex. Civ. App. 1929), 23 S. W. (2d) 461, it was held:

> "Where injury sustained by proximity of switch stand to track, judicial inquiry is not precluded by urging defense that its location is an engineering question."

The Confusion of the Supreme Court of Nebraska in Dealing with the Issues of Negligence in the Case Is Manifest and It Failed Woefully to Scrutinize and Determine the Issues in Conformity with the Decisions of This Court

It said, in direct conflict with the facts:

> "(a) It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined,"

and after setting up this hypothetical statement of facts which is in direct conflict with the evidence, says:

> "Under such circumstances the failure of defendant to have engineers professionally redesign its system of tracks and move them further west after construction

of the Casein Building, over which it had no control, was not negligence."

It was not necessary for defendant to have control of the Casein Building in order to perform its duty to provide and maintain a reasonably safe place of work for its employees. The evidence is conclusive that it alone exercised and had dominion over the Casein Spur track; it could have moved the track a little farther from the building; there was nothing to prevent it from adjusting the track so as to provide a safe place on the easterly side thereof which was the appropriate side because that was the engineer's side. There was plenty of room to the west; a few extra inches in that direction would have made the place safe; it would have been an easy and inexpensive operation to move the track further west and to extend the loading platforms as might be necessary. There was here no complicated or technical engineering problem.

The Supreme Court of Nebraska In Its Opinions of July 20, 1945, and of March 22, 1946, Demonstrates Its Inability to Cope with the Issues, In Line with the Applicable Decisions of this Court.

Ellis v. *Union Pacific R. Co.*, 146 Neb. 397, 19 N. W. (2d) 641;
Ellis v. *Union Pacific R. Co.*, — Neb. —, 22 N. W. (2d) 20.

These two decisions of the highest state court appear to be in conflict except as to final result and conclusion, viz., that petitioner did not make out a submissible case. The first decision comes closer to stating the facts than does the second decision, and is noteworthy for its failure to cite any of the decisions of this court in cases arising under the Federal Employers' Liability Act, as amended in

1939. The second decision for the first time makes reference to the *Tiller, Tennant* and *Bailey* cases, *supra,* and obviously was a valiant effort on the part of the State Supreme Court to justify its original decision on grounds not out of harmony with the applicable decisions of this court.

In the first decision, in discussing the issue as to whether or not respondent was negligent in failing to provide and maintain for petitioner a reasonably safe place of work, the Nebraska Court said:

> "A determination of this issue, or these issues, does not depend upon a resolution of disputed facts. It depends upon application of legal principles to a subsantially undisputed set of facts,"

and then states:

> "There was not sufficient space within which to work at the point where plaintiff was hurt. As already pointed out, plaintiff was in charge of the train crew and it was his duty to control the movements of the train. It was the duty of the engineer to control the movements under the direction of plaintiff or the brakemen who were under plaintiff's control. Control was exercised in daylight by hand signals. Plaintiff was properly exercising control at the time of the accident. It was customary and usually more convenient to exercise control from the right (Engineer's side, that side next to Casein building) rather than the left side, and especially on a curve, the inside of which was to the right, for the reason that it was easier to get signals to the engineer, whose position is in the cab on the right side of the engine. It is also the usual, customary and acceptable practice for trains to be controlled by the engine foreman and his brakemen from the opposite side by relay of signals, usually through the fireman, to the engineer, where convenience, safety, or judgment require. If the latter practice had been followed in this instance this acci-

dent could not have occurred, since on that side of the train there was no question of narrow clearance or obstruction." (R. 351.)

The undisputed fact, as disclosed by the testimony of engineer Buzard, is that on the Casein Spur it was customary for switchmen participating in such a move to work on the engineer's side. He further said that previous to the accident, including all of the time he was firing an engine, as well as while working as engineer, and this covered a period of 18 years, he never saw a man work on the other side of the engine, and that "he always worked on the engineer's side." To make it even clearer and more definite and certain, the engineer further testified that it was not until after petitioner Ellis was injured that on a few occasions, "maybe once or twice," they have worked on the fireman's side.

The Court further said, in its first decision:

> "On the question of negligence on the part of plaintiff, warning or knowledge of the dangerous situation is a matter of importance,"

and then said,

> "A warning of impaired clearance was appropriately placed by the carrier"

(here the Court is usurping the function of the jury because that asserted fact was in dispute),

> "But plaintiff said he had not seen it and the effect of his testimony is that he was never in a proper position to see it. Also he said that he had never been in this vicinity and had no previous knowledge of the surroundings. For present purposes, therefore, it must be assumed that he had no previous warning of the conditions complained of and was chargeable with no knowledge or information in regard thereto except such as would flow from reasonable observation, under

the conditions and circumstances, in the light of his knowledge and experience in the work in which he was engaged." (R. 351.)

The Court then said:

"Whether or not defendant was negligent depends upon the question of whether or not, under the recited facts and within the meaning of the law, the defendant furnished plaintiff a reasonably safe place to work, assuming, of course, that plaintiff had no previous knowledge and was not warned of the impaired clearance between the track and the building."

Continuing, the Court said:

"As a condition to a finding of negligence against the defendant in this respect it must appear either that plaintiff was required to work in the position where he was injured, or that the surrounding conditions and circumstances, coupled with his experience and the requirements of his employment, were insufficient to reasonably apprise him of the danger of that position,"

and then said:

"As already pointed out, he was not required, in the performance of his services for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own." (R. 352.)

The Court then said:

"The evidence of plaintiff must be accepted, the effect of which is to say that he was not in fact aware of the danger. Was the danger, then, under the circumstances, of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not

the plaintiff was guilty of negligence, which was the proximate cause of the accident." (R. 352).

The Court then said:

> "Under the rule of the cases in this respect, the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not know or could not know of his danger. We think his evidence is not subject to such an inference. It was daylight, he gave the signal for the movement, then, not seeing the brakeman who was to give a signal for the spotting of the car, he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught. Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care, the danger would have been obvious. It follows, therefore, that the plaintiff, having failed to prove any of his charges of negligence, the Court erred in submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence, which was the proximate cause of the accident, * * *." (R. 355).

It is self evident from the above quotations from the opinion in its first decision, that what the Nebraska Court did, was to hold in effect that respondent was free from negligence because petitioner assumed the risk. In other words, the Supreme Court of Nebraska did the very thing which was condemned by the decision of this Court in the *Tiller* case, *supra*. The State Court, in its first opinion, stated facts and inferences deducible from the evidence

that were favorable to petitioner, more so than it did in its second opinion. For instance, with respect to the propriety of petitioner working on that side of the track where he was injured, and the reason for his being there, the Court said:

> "During the afternoon he (petitioner) received an order from the Yardmaster to remove a loaded car from the Spur (Spur Track at Casein building). About 7:00 o'clock P. M. it is true he went to the switch leading into the spur and found thereon two cars, one loaded and one empty. The loaded car was removed, after which, under his direction, the empty car was being returned to be spotted to the west and opposite the Casein plant loading platform. The engineer was backing the car on the spur and receiving his signals for movement from the plaintiff. Just before the accident occurred plaintiff was on the east side of the track and between the car and the building. A brakeman was farther south for the purpose of passing signals to plaintiff, to be passed on by him to the engineer. The purpose of all of which was to spot the empty car opposite the loading platform. According to plaintiff's testimony, the brakeman passed from view on account of the curvature of the building, whereupon plaintiff turned and walked a few feet south. The car continued in the same direction, and in consequence of the narrow space between the track and the building he was caught between the center of the car and the building. That he was caught because there was not sufficient clearance at that point is not questioned." (R. 346-7)

> "In the performance of his work and the control of the train it was proper for the plaintiff to be on the right side. A proper place also was on the opposite side. In the present instance it was less convenient to be on the left side, in view of the curvature of the track and the fact that the engineer, to whom signals were required to be transmitted, was on the right side. The area to the west, or left side, was open

. . and on that side there was no impaired clearance." (R. 347).

The State Court later, in its first opinion, said:

> "As already pointed out, he was not required, in the performance of his services for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided." (R. 352).

In its first decision the State Court did not pass upon the question of whether or not plaintiff was guilty of negligence which was the proximate cause of the accident, but seemed to be laboring under the delusion that "the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not or could not know of his danger."

It seems to us that the first decision of the State Supreme Court, in holding that petitioner failed to establish negligence of respondent in failing to provide and maintain a reasonably safe place of work, was based on an unsound foundation and on a theory in conflict with the decisions of this Court. It absolves defendant of negligence because it concluded that the burden was upon petitioner to prove that he did not and could not know of the danger, and on the theory that if petitioner had chosen the other side of the track in which to work he would not have been injured. What it did, without saying so, was to hold respondent free from negligence on the ground that plaintiff assumed the risk.

In holding that "the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn, that in the exercise of reasonable care he did not or could not know of his danger", the Supreme Court of Nebraska either inadvertently or unwittingly, or in confusion as to applicable law, confounded some theory of the assumption of risk with some theory of contributory negligence, and

to cap the climax put the burden on petitioner to prove his freedom from either. That these defenses are affirmative defenses, which must be pleaded and proven by defendant, is so well established as to require no citation of authority. However, we call attention to the case of *Central Vermont R. Co.* v. *White*, 238 U. S. 506, 59 L. Ed. 1433, wherein this Court said:

> "The United States courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant."

In the case of *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 462, 60 L. Ed. 1102,

> "The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment but which result from the employer's negligence."

Numerous cases are cited in support of that statement of law in the *Proffitt* case. As assumption of risk is no longer a defense in actions under the Employers' Liability Act, there is no need to further pursue that subject. Reference to contributory negligence and assumption of risk in this part of the Brief is merely for the purpose of emphasizing the delusions under which the Supreme Court of Nebraska labored.

In *Owens* v. *Union Pacific R. Co., supra*, this Court commented that the burden of establishing assumption of risk rests upon defendant.

Final Opinion and Decision of the State Court

It is obvious and apparent, from a reading and comparison of the two decisions of the Supreme Court of Nebraska in the case at bar, that in order to justify the decision of reversal and dismissal of the action with some semblance of reason, the State Court found it necessary to arrive at

the conclusion that the petitioner was guilty of negligence, which was the sole cause of his injury (a conclusion which it avoided or evaded in the first opinion). Such conclusion is untenable, is not supported by the evidence, rests in part on misstatement of fact and distorted inferences. For instance, it is stated in the second opinion:

> "The engineer was subject to plaintiff's commands as he backed south over the Casein Spur at the Myrtle Street crossing. At that time plaintiff stood in the street on the engineer's side, near the corner of the Casein building, at or near a sign, approximately eight feet nine inches (8 ft. 9 in.) high, bearing large type: 'Impaired Clearance'."

Such were not the facts, as indicated by the plat and the testimony of petitioner, reference to which is made in the petition. He crossed the Casein Spur Track from the westerly to the easterly side thereof at a point well beyond (south) the alleged location of the sign, without knowledge of its existence or its significance. In the position occupied by petitioner after he crossed the track, the back and not the face of the sign would have been visible to him. It has already been pointed out in the petition that the photographic exhibits showing the impaired clearance sign must be viewed and considered in connection with the plat to get the right perspective; otherwise the photographs are very deceptive because in the photographic exhibits the sign appears to be close to the building and near where petitioner met with injury. In fact, the sign was between 30 and 40 feet from where petitioner was injured.

In its second opinion, as originally filed on March 22, 1946, in commenting on testimony of locomotive engineer Buzard, the Court said:

> "He never previously had observed employees working between the track and the adjacent building."

The engineer, in fact, had testified that until after Ellis was injured he had never observed or known of employees working on the other side of the track, and that only on one or two occasions since Ellis was injured had they worked on the fireman's side. It should be noted here that this was the testimony of a man with eighteen years of experience, working in and out of the Casein Spur Track in the capacity of either fireman or engineer. This grotesque error and mistake of the Court was evidently called to its attention a few days after the opinion was filed, the source of which we suspect but do not know, for a few days thereafter the foregoing quotation of fact was supplemented by adding thereto the words, "at the point of the accident." The engineer did not so testify. The Court also said:

> "At the inside apex of the curve of the track the building jutted slightly to the west, although the wall of the building extending south from that point was generally the same distance from the track, to-wit: 57 inches. At that jutted point, however, it was nearest the center of a car traveling south around the curve. At all other points north and south along the wall of the building, except the one where plaintiff happened to be at the time of the accident, there was sufficient clearance to avoid injuring plaintiff."

This statement of the Court is misleading unless considered in connection with the plat, the testimony of petitioner, and the undisputed fact as to just where he stood at the time of his injury. The so-called jutted diagonal of the building wall was many feet in length and at the time petitioner was injured he was standing approximately 10 feet south of where the jutted wall began and probably up against the wall. It was the degree of curvature of the track and the shortness thereof that brought the center of the car to this one short spot where there was not sufficient clearance; in fact, there was no clearance; this condition was unknown to

petitioner; he had not been warned against it; he may have been negligent in not being more alert, but he was engrossed in his work and he was trying to keep in contact with the engineer, who was to his north, and the switchman helper, who was somewhere to his south; a portion of the car had cleared him and it was while he was looking to the south and then turned in the direction of the engineer that the center of the car caught him; he was trapped before he discovered the danger, of which he had received no warning. The attention of the engineer was not distracted as was that of Ellis. The engineer had to look in only one direction; he had his eyes on Ellis all of the time, according to his testimony; that was his duty. He could see Ellis, one side of him, from his feet to the top of his head. He observed Ellis' foot turn and knew at once that there was something wrong and stopped almost instantly; the engineer had a commanding view of what was ahead of him; it was daylight; if he could see Ellis from his feet to his head, looking through the narrow space between the side of the car and the building wall, it follows that the engineer could and must have seen the side of the box car converging or crowding in the direction of Ellis. Bear in mind that this engineer had many years of railroad service behind him; he had been in on this Casein Spur many times. He knew, or in the exercise of ordinary care should have known, that Ellis was in jeopardy and that Ellis did not know it. The engineer should have done something about it. He should either have warned petitioner or stopped the movement; to be free from negligence the engineer was in duty bound to exercise reasonable care, under the circumstances, to avert injury to Ellis. It is not contended by petitioner that the engineer failed to exercise reasonable care after Ellis became trapped; it is the contention of Ellis that the engineer was negligent in permitting Ellis to become caught

in the trap. It is believed that the engineer's negligence and its proximate cause of the injury to Ellis was fairly a question of fact for determination by the jury. The fallacy of the final decision of the Nebraska court is in holding Ellis guilty of neglect, which was the sole cause of his injury. It charges him with full knowledge of all of the dangers and hazards existing, this in spite of the fact that Ellis was not a thoroughly seasoned and experienced switchman and that he had had little, if any, opportunity to become familiar with the specific danger which resulted in the occurrence of injury to him. On the other hand, it fully releases the engineer from any responsibility, notwithstanding his many years of experience in the service of respondent and in active work upon and about the Casein Spur. It would seem that the Nebraska court did not exercise sound judgment in appraising the justifiable inferences deducible from the evidence and that in its conclusions and action it has usurped the functions of the jury, in violation of the applicable decisions of this Court. The cases cited by the Supreme Court of Nebraska in support of its conclusion that Ellis was guilty of negligence, which was the sole cause of his injury, do not sustain such conclusion. Those cases, such as *St. Louis and S. W. R.* v. *Simpson*, 286 U. S. 346, 52 S. Ct. 521; *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212; *Brennan* v. *Baltimore & Ohio R. Co.*, 115 Fed. (2d) 557, are clearly distinguishable. Each of those cases involved the violation of a specific and imperative duty which was a primary duty of the person injured and which was the sole cause of the disaster. In respect to other cases cited by the Nebraska court and such text as is quoted in the opinion from (I) Bailey, Personal Injuries, 2d ed., and 39 C. Juris, Master and Servant, it is well to bear in mind that the statements therein contained date back many years when it was public policy to insulate the

master against the so-called "human overhead," and when such defenses as contributory negligence, assumption of risk, and negligence of fellow servant were still effective bars to a recovery by plaintiff in a personal injury suit. The *Tiller* case, *supra; Chicago G.W. R. Co.* v. *Peeler,* 140 Fed. (2d) 865; *Thomson* v. *Boles,* 123 Fed. (2d) 487, 491, indicate that these cases under the Employers' Liability Act are to be appraised in the light of a more enlightened public policy. The Nebraska court in its decision has also taken the harsh view and adopted a strained construction of law in holding that it was not necessary for petitioner to work on the easterly side of the Casein Spur and that he was not required to do so. To sustain its conclusion it has been forced to apply a mandatory meaning to those words. In such construction the Court has gone to great extremes. In most instances it is hardly ever necessary or required that the injured party be at work in the precise spot where he meets with violent injury. It would seem rather that the test should be: "Did the master sanction and permit the use of the place where the servant was injured in furtherance of the master's business?" as in the case at bar, where the custom and practice on the Casein Spur was for switchmen to work on the easterly side of that track. The undisputed evidence, as previously pointed out, is that it was not until after Mr. Ellis was injured that on a few occasions such work was done on the westerly side of the track. The case of *Outcelt* v. *Chicago B. & Q. R. Co.,* 150 Minn. 398, 185 N. W. 495, indicates the proper rule which is favorable to petitioner. The case of *Herring* v. *G. N. R. Co.,* 137 Wis. 367, 119 N. W. 325, cited by the Nebraska court, is not in point; there the servant was injured between a car and a loading platform; the space between the car and the loading platform was not intended as a place of work. The platform cases are distinguishable. The case of *Sweet* v.

Michigan Central R. Co., 87 Mich. 559, 49 N. W. 882; and *Hemmingsen* v. *Chicago N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785, support the contentions of petitioner. It is further evident that the Nebraska court became confused as to the law in respect to the "safe place of work doctrine," because respondent was not owner of the Casein Company building or the property upon which it was located. The court said:

> "There is no evidence that defendant owned, constructed, or had any control over the Casein Company building or the property upon which it was located. There is no evidence that it was constructed or maintained with defendant's consent. It was constructed or re-constructed following a fire, after defendant's tracks were laid in their present form and manner."

And then went on to say, after erroneously stating that the easterly side of the Spur Track was not a place to work,

> "Under such circumstances the failure of defendant to have engineers professionally re-design its system of tracks and move them farther west after the construction of the Casein building, over which it had no control, was not negligence."

Even if such were the facts, it would seem that either before, or at least after the building was reconstructed that respondent would be under some duty to inspect for the purpose ascertaining whether or not the reconstruction of the building created an unsafe place of work for defendant's employees, and if so, it clearly would impose a duty on defendant to give adequate, sufficient and proper specific notice and warning of the danger. That defendant paid little, if any, attention to the safety factor is self evident from the fact that this track had been in existence for many years, both before and since the fire which destroyed the building which the so-called Casein building replaced. Also

that at the time of its original construction another spur track ran off from the Casein Spur to an adjoining property and plant immediately west of the Casein Spur. Because of that original construction there may have been some necessity for locating the Casein Spur as originally constructed to make proper room and allow for the other spur track which served the adjoining property to the west. However, the evidence is undisputed that this other spur track had been abandoned for many years, notwithstanding which defendant left the old abandoned track where it was and permitted to remain in the Casein Spur Track a so-called frog, or crossover, by means of which the abandoned track connected with the Casein Spur (R. 178-9). This frog had never been removed, notwithstanding it created a hazard to railroad operation on the Casein Spur and should have been removed (R. 340). Attention is called to this matter as an illustration that defendant was not greatly concerned over the safety of its employees while performing switching duties in or about the Casein Spur.

Notwithstanding the assertion of the Nebraska Court that defendant had no control over the Casein building and hence was under no obligation "to have engineers professionally redesign its system of tracks and move them further west after construction of the Casein building", this cannot be said to be a legal excuse for its failure to locate this short spur track somewhat farther from the narowest point of clearance, particularly so because of the short length of that narrow space, and where there was ample open space to the west. Defendant's general yardmaster, Estes, admitted that there was considerable open space on the westerly side of the track. (R. 227). That plat, Exhibit 1, also shows this. Under the statute law of the state of Washington, defendant was clothed with sufficient power to locate and construct spur track

in such a way as to fulfill its obligation to provide and maintain for its employees a reasonably safe place of work.

REMINGTON'S REVISED STATUTES OF WASHINGTON, SECTION 10465, VOLUME 11, PAGE 118

"Spur Tracks—Limit as to eminent domain—Any railroad corporation organized under the laws of this state, or of any other state, and authorized to do business in this state and owning or operating a railway in this state, may construct, maintain and operate public spur tracks, from its railroad or any branch thereof, to and upon the grounds of any mill, elevator, storehouse, warehouse, yard, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, with all side tracks, storage tracks, wyes, turnouts, and connections necessary or convenient to the use of same; and such company may acquire by purchase or condemnation, in the manner provided by the laws of this state for the acquisition of real estate for railway purposes, all necessary rights of way for such spur tracks, side tracks, storage tracks, wyes, and turnouts, and connections; said spur when constructed to be a public spur for the use of all industries located or thereafter located thereon * * *."

NOTE: The omission has to do with extent of mileage or length of such spur tracks.

Failure to Warn Petitioner Constituted Negligence and was In Violation of the Duty to Provide and Maintain a Reasonably Safe Place of Work.

Prior to the time that plaintiff was caught by the car he received no warning from the engineer and had never received any warning, notice, or instructions from the engineer, or other members of the crew, with respect to the clearance between the track and the building, or any warning or instructions with respect to the degree of

curvature of the track as it rounded the building. None of his superiors had ever warned or instructed him as to the situation and condition on the Casein Spur Track with respect to insufficient clearance. (R. 63-4). Up to the time the car came in contact with him he did not know that he was in a place of danger or that there was insufficient clearance. (R. 32). It had been agreed at the trial that there had been no change in the location of the tracks or building since Ellis was injured. (R. 27). This admission laid the foundation for considerable of the evidence that was introduced as to conditions that were observed subsequent to the accident. Plaintiff also testified that he was not in the vicinity of the northwest corner of the Casein building at any time on the day of the accident, or at any previous time, and made no observations until sometime after he was hurt. (R. 119-120). In preparation for the trial defendant had taken plaintiff's discovery deposition on March 6, 1944. (R. 74). At the trial this question was asked Mr. Ellis: Let me ask you, Mr. Ellis, at the time your deposition was taken, if these questions were asked and if you made these answer?:

> "Q. The place where you were standing is the place where the greatest curvature of that track occurs, isn't it?
> A. I believe so. I never measured it. I don't know.
> Q. Is that the way it appeared to you?
> A. That is the way it looked.
> Q. As you were standing there?
> A. Yes.
> Q. Did you so testify?
> A. Yes." (R.103-104).

On the basis of this quoted testimony, the Supreme Court of Nebraska adopted an inference unfavorable to plaintiff as to knowldege of the conditions, whereas in view of

plaintiff's positive testimony that he had made no observations and did not know of the conditions until long after the accident, it was a justifiable inference for the jury to draw that this testimony of plaintiff was induced by observations made after the accident. It appears from the testimony of plaintiff that since the accident he had had visited the scene of it three or four times, the first time being between June 22 and the latter part of August, 1943, and the last time being a day or two before his deposition was taken, which was on Monday, March 6, 1944. (R. 125-6). On the first of these visits it was also the first time that he had ever observed the impaired clearance sign. (R. 126). At no time before plaintiff was injured had he made any close or particular observation or inspection with reference to the curvature of the Casein Spur Track and the distance between the track and the Casein building; and at the time he walked over to the east side of the track, testified that his mind "naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it." (R. 119-120, 134).

It is clear, from the evidence, that defendant not only maintained and provided an unsafe place of work on the easterly side of the Casein Spur Track, and sanctioned and permitted its employees there to work, by long continued usage, custom and practice, all without timely, adequate or sufficient notice and warning of the danger. That its negligence in so doing was, under the evidence, an issue for the jury is not open to doubt. This Court, in the case of *Kanawha and Michigan Railway Co.* vs. *Kerse*, 239 U. S. 576, 60 L. Ed. 448, in the syllabus said:

> "It is actionable negligence under the Employers' Liability Act of April 22, 1908, 35 Stat. L. 65, c. 149, Comp. Stat. 1913 (sec. 8657), for a railway company, through its employees, to conduct its switching opera-

tions upon a private switch in such a manner as to endanger the lives of brakemen upon its cars."

The facts, in some respects are analogous to the facts in the case at bar, notwithstanding that the obstruction was an overhead one over a private switch track, the obstruction having been erected not by the railroad company but by the Kanawha Brewing Company which had a private switch running through its premises and connecting with defendant's main line; and the obstruction had been in position over a period of time estimated as varying from two or three days to a month. It further appeared:

"It was necessary for members of defendant's yard crew to pass in and out of the switch and under the obstruction frequently. The timber was in plain view but because of a sharp curve in the switch track could be seen by those upon the top of a car for only a short distance when approaching it. On the 23rd day of April a switching crew, of which Barry was that day a member, went upon the switch to haul out upon the main line a car destined for interstate commerce. The engine, in charge of one Leonard, was backed in upon the switch and Barry coupled up the car, which was an ordinary box car, and then climbed to the top of it. Leonard started to pull out of the switch and as the train proceeded, Barry, who was standing near the rear end of the car, and not looking forward, but sidewise, (presumably watching Wintz, the conductor, who was standing upon the ground, in charge of the train), came in contact with the timber and was thrown to the ground, sustaining a fracture of the skull, from which he soon died."

The Court then said:

"The action of the Railway Company, through its employees, in conducting its switching operations upon a switch obstructed, as this one was, in such a manner as to endanger the lives of brakemen upon its cars,

speaks so clearly of negligence that no time need be spent upon it. The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company."

The rule which requires the employer to exercise ordinary care to provide and maintain for the employee a reasonably safe place of work includes the duty to give warning in respect to dangerous and hazardous conditions, and particularly as to such as are not obvious and readily observable. It also includes the duty to adopt a safe plan and method of doing the work; it may require the promulgation, adoption, and enforcement of rules and regulations in respect to how the work is to be done and carried on. The duty is a broad one, designed for reasonable protection of life and limb. The duty to furnish a safe place of work is applicable even in situations where employees are sent to the premises belonging to another. *Kanawha Michigan R. Co.* v. *Kerse, supra; Ryan* v. *Twin City Wholesale Grocery Co., et al.*, 210 Minn 220, 397 N. W. 705; *Harding* v. *Railway Transfer Co.*, 80 Minn. 504, 83 N. W. 395; *Hemmingsen* v. *Chicago N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785; *Sweet* v. *Michigan R. Co.*, 87 Mich. 559, 49 N.W. 882; in the case of the *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 462, 60 L. ed. 1102, this Court, speaking through Mr. Justice Pitney, said:

"The employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, (and this includes care in establishing a reasonably safe system or method of work)."

In *Hemmingsen* v. *Chicago N.W. R. Co., supra*, a case in many respects closely analagous to the case at bar, a notice had been served on the injured employee before the injury, "to the effect that there were obstructions dangerously

close to the track and that he was required to look out for them". It was contended that service of this notice was sufficient warning of the danger and that the employee assumed the risk and was guilty of negligence. However, the Wisconsin Court disposes of this contention, stating:

> "There is no claim, however, that any notice was given deceased of the particular dangerous condition in question, and we do not think, as a matter of law, such notice could have the effect of charging him with the assumption of risk, or of negligence in not finding it."

In *Southern Railway Co.* v. *Hobbs* (C.C.A. N.Car. 1929), 35 Fed. (2d) 298, it was held:

> "Evidence of failure to warn switchmen of electric lights hung dangerously low over tracks, was sufficient to make case for the jury."

In *Westover* v. *Wabash R. Co.* (Mo. 1928) 6 S.W. (2d) 843, it was held:

> "Whether nearness of switch stand to track and danger therefrom would have inevitably appeared to person in plaintiff switchman's position, was jury question."

In *McIntyre* v. *St. Louis & San Francisco Ry. Co.* (1921), 286 Mo. 234, 227 S. W. 1047, certiorari denied (1921), 41 S. Ct. 376, 255 U. S. 573, 65 L. ed. 792, it was held:

> "In an action for death of a switchman carried against falsework in dangerous proximity to the track, whether defendant railroad exercised reasonable care in respect to warning decedent of the dangerous character of the falsework, was for the jury under evidence."

In *Texas* v. *Pacific R. Co.* v. *Swearingen*, 196 U. S. 51, 49 L. ed. 382, this Court said:

> "A railway company cannot be said as a matter of law to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than two feet for the movements of a switchman between the side of a freight car and the scale box when encumbered with a lantern for signal purposes.
>
> "Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box."

In *New York, C. & St. L. R. Co.* v. *Peele* (1929), 164 N. E. 705, 88 Indiana App. 532, certiorari denied, 279 U. S. 842, 73 L. ed. 988, it was held:

> "That placing of tracks in dangerous proximity was due to the presence of buildings was not sufficient excuse therefor."

In *New York* v. *C. & St. L. R. Co.* v. *Boulden* (C. C. A., Ind., 1933), 63 F. (2d) 917, certiorari denied (1933), 53 S. Ct. 785, 289 U. S. 753, 77 L. ed. 1948, it was held:

> "Railroad's negligence in allowing projecting post at edge of station platform causing conductor to fall, was for jury."

In *Washington Ry. & Electric Co.* v. *Scala* (1917), 27 S. Ct. 654, 244 U. S. 630, 61 L. ed. 1360, affirming, 45 App. D. C. 484, it was held:

> "Maintenance of electric railway of a pole so close to track that conductor cannot safely discharge his duties, was evidence of negligence, justifying submission of question of liability of company for his death."

In *Baker* v. *New York, N. H. & H. R. Co.* (1920), 181 N. Y. S. 675, 191 App. Div. 322, it was held:

> "Where an employe was killed by coming in contact with a charged electric wire, so placed on the bridge where he was required to work that he might, through momentary inattention, stumbling, or carelessness, come in contact with it, and there was no evidence that screening the wire, or locating it so that it would not come in contact with employes, was impossible, it could not be said as a matter of law that a safe place of work had been furnished, though there was no evidence of the practice of other companies, and it was error to direct a verdict for defendants."

The Supreme Court of Nebraska Was in Error in Holding That the Evidence Did Not Justify the Submission to the Jury of the Engineer's Negligence

In its first decision that Court, erroneously, concluded that this issue was submitted under the doctrine of "last clear chance." In its second decision the Nebraska Court abandoned this fallacious theory and, then, adopted the untenable conclusion that this issue was not submissible on any theory. As already pointed out, Engineer Buzard had many years of experience, both as locomotive fireman and engineer; he had worked in and out of the Casein Spur track in switching operations over a period of eighteen years in switching Spur track was located in close proximity to the Casein Building ever since that building was constructed following the destruction by fire of a building formerly occupied by Fox River Butter Company at substantially the same site; defendant's assistant superintendent did not recall that any change was made in the location of the spur at that time and the evidence is persuasive, if not conclusive, that no change had been made in the location of the Casein spur track during a period of at least eighteen (18) years preceding the accident to Peti-

tioner Ellis (R. 239-40). As pointed out in the summary of the evidence contained in the Petition for Writ of Certiorari, defendant alone exercised dominion over this track; it was a dead-end track capable of holding not to exceed five or six box cars; as shown by the plat, the Casein Building had but three unloading platforms spaced far enough apart so that a car could be spotted at each loading platform; the evidence further is that any engine coming into the Casein Spur track would have to do so by backing in and this of necessity brought the engineer's side of the locomotive next to the building. The implication is overwhelming that the engineer was thoroughly familiar with the conditions existing on the easterly side of the Casein Spur. In backing in on this track, he was on the inside of the curve; the action of a box car in rounding the curve would be repeated, in some degree, by the engine tender as well as by the locomotive or engine proper whenever the tender or locomotive would go in on the Casein spur far enough to round the curve in the track, which must have been the case whenever a box car had to be spotted at or removed from these various loading platforms. In spite of these indisputable facts, the Supreme Court of Nebraska jumped to the conclusion that the engineer was unaware of the danger and impending peril to Petitioner Ellis; this in spite of the testimony that the engineer had his eyes upon Ellis at all times and that his imperative duty was to watch Ellis; the engineer had a commanding view of what was going on ahead and in the narrow space that existed between the car and the building as the car was being shoved in on the track he could not help but notice and observe that as the car proceeded ahead the side of it was gradually edging over toward Ellis. If the engineer did not see what was taking place, and if he did not appreciate that Ellis was in imminent danger, it was merely so because he was

careless and not alert. At least, that was an inference which the jury could properly draw from the facts and circumstances. In order to exonerate the engineer from a charge or inference of negligence the Nebraska Court, in its final decision, said

> "No such accident had ever happened in his previous experience. He never previously had observed employees working between the track and the adjacent building at the point of accident. He was not aware that plaintiff would place himself in danger and the peculiar happening was not reasonably foreseeable by him."

The answer to that line of reasoning is that Ellis had already placed himself in a position of danger; that this should have been apparent to the engineer; that he should have appreciated that Ellis was unaware of his danger and if, as the Nebraska Court said:

> "He never previously had observed employees working between the track and the adjacent building at the point of accident,"

this should have put him even more on the alert. That the engineer could have avoided the accident by prompt action on his part either by stopping the movement before Ellis was caught or by warning Ellis is self-evident. The distance within which he stopped after Ellis was caught, and the fact that this particular engine had the best brakes of any engine defendant had and that it could be stopped quicker than any other engine confirms the negligence of the engineer in not avoiding the accident (R. 194-5). It is believed by petitioner that the testimony of the engineer, considered in its entirety in connection with the undisputed facts and circumstances, makes it clear that there was a submissible case for the jury on the issue of the engineer's negligence.

That the Supreme Court of Nebraska was in confusion as to some of the facts and the evidence is illustrated by what that Court said in its second decision in which it exonerated engineer Buzard of negligence. It said, in the decision as filed March 22, 1945,

> "He never previously had observed employees working between the track and the adjacent building" (R. 383).

Some days later it added to that statement the words, "at the point of accident" (R. 383). Engineer Buzard, however, testified as follows:

> "Q. Can you tell us whether or not Mr. Ellis was working on the customary side in respect to the movement you were making at the time of the accident?
>
> "A. Well, all I can say about that is that previous to this accident and including all of the time I was firing an engine I never saw a man work on the other side of the engine. He always worked on the engineer's side (R. 196).
>
> "Q. *In* on that Casein Spur Track?
>
> "A. Oh, I would say maybe onec or twice they have worked on the fireman's side since then, but most always they worked on my side" (R. 196).

It is suggested that a reading of the entire testimony of engineer Buzard will be helpful to this Court in determining that his testimony, in connection with undisputed facts and circumstances, clearly made the alleged negligence of the engineer a question of fact for determination by the jury and not the Supreme Court of Nebraska. It might as well be stated here that the able and learned trial Court followed the applicable decisions of this Court, but that the Supreme Court of Nebraska did not.

Although the Court in its first opinion had said that either

side of the track was a proper place to work (R. 347), it made a complete turn about in its second opinion wherein it said:

> "It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duties. It was not a place to work, as hereinafter defined" (R. 386).

While the last quoted statement was in that part of the opinion which dealt more with the question of defendant's negligence in failing to provide or maintain for its employees a reasonably safe place of work, it illustrates and emphasizes that the Supreme Court of Nebraska was searching the record for evidence and inferences which would lend support to a conclusion that defendant was free from negligence; and, that it did not, in accordance with the federal rule, and the applicable decisions of this Court approach the questions involved on the appeal from the standpoint of due consideration to all reasonable inferences favorable to this petitioner.

The Nebraska Court in its second opinion herein evidently concluded that petitioner failed to prove by any substantial evidence the negligence of defendant in respect to any of the issues submitted, as well as that he failed to prove by substantial evidence that the negligence asserted was the proximate cause of his injuries. In reaching such conclusion it would seem to be clear that the Nebraska Court did not give to plaintiff the benefit of all the evidence and reasonable inferences which favored plaintiff's cause, and that the Nebraska Court interpreted that which in fact and in law was substantial evidence to be but a scintilla of evidence and to be but speculative and conjectural. It is believed by petitioner that this error of the Supreme Court

of Nebraska is clearly established by the decisions of this Court.

Lavender v. *Kurn*, — U. S. —, 90 L. Ed. 692. Decided March 25, 1946;

Seago v. *New York Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

Jenkins v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

New York Central R. Co. v. *Marcone*, 281 U. S. 345;

Puget Sound Power & Light Co. v. *County of King*, 264 U. S. 22;

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. ed. 610, 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 L. ed. 322;

Bailey v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. ed. 1444, 63 Sup. Ct. Rep. 1062

Tennant v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

Owens v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. ed. 1683;

Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 L. ed. 490.

In addition thereto:

Myers v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906;

Western Atlantic R. Co. v. *Hughes*, 278 U. S. 496, 73 L. ed. 473.

The Supreme Court of Nebraska Erred in its Final Conclusion that Petitioner Ellis Was Guilty of Negligence Which Was the Sole Cause of His Injury

In arriving at this conclusion the Nebraska Court did so in violation of the applicable decisions of this Court. Its reasoning was still contaminated by some of the old com-

mon law rules which had caused courts to scramble negligence, contributory negligence and assumption of risk. The Nebraska court was still flirting with assumption of risk regardless of certain statements made in its second opinion, which, on the face, indicated some endeavor to take note of the applicable decisions and rules of this Court. It said:

> "However, it is as important to remember that the employee still assumes the risk of those of the dangers in his employment which are naturally inherent in the business and not caused by or the result of defendant's negligence."

The extent to which this remembrance of assumption of risk influenced the court in its final conclusions is rather apparent from a comparison of its two opinions in the case at bar. In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58, 87 L. Ed. 612, this Court said:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 U. S. C. A., Section 1: 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with an assumption of the risk under another name;' and no such result can be permitted here."

It may well be that plaintiff was guilty of some negligence and the jury could so find. However, on the record in this case his negligence was no more than contributory to and concurrent with that of defendant. This conclusion, we believe, necessarily follows from such cases as

Tiller v. *Atlantic Coast Line R. Co., supra;*

Owens v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683;

Outcelt v. *C. B. & Q. R. Co.*, 150 Minn. 398;

Union Pacific R. R. Co. v. *Hadley*, 246 U. S. 330, 334, 62 L. Ed. 751.

The reasoning of this Court in *Owens* v. *U. P. R. Co.*, *supra*, in connection with the facts of that case appears to be decisive in support of petitioner's contention that the Supreme Court of Nebraska was in error in holding that petitioner was guilty of negligence which was the sole cause of his injury. At the time Owens' cause of action arose the defense of assumption of risk had not yet been wiped out by the 1939 Amendment.

In *Owens* v. *Union Pacific R. Co.*, *supra*, the Supreme Court again had occasion to reverse the court below (129 Fed. (2d) 1013). This case is of interest and helpful to a proper decision in the case at bar; Owens, a switchman of 15 years' experience, was injured while a member of a switching crew, his injury and subsequent death resulting from an engine movement. Owens was injured prior to the 1939 Amendment of the Federal Employers' Liability Act, which abolished assumption of risk. The railroad company introduced evidence to avoid any implication of negligence and to establish an asserted defense of assumption of risk. Commenting on this evidence, the Supreme Court said:

> "The purpose of this evidence apparently was twofold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se. But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and

would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.

"The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law."

Attention was called to the *Tiller* case and the Court said:

"Recently this court reviewed the 'maze of law which Congress swept into the discard' when, in August 11, 1939, it amended the Employers' Liability Act to abolish the defense of the assumption of risk. In view of the Amendment, no good purpose would be served in going over this morass again merely to dispose of this case, but we point out a few lodestars."

The Supreme Court ruled that assumption of risk was not conclusively established, stating:

"For, to prevail on this defense, Respondent had the burden of persuading the jury that the risk of being run down was 'so observable' that Owens was in fact aware of it and decided to chance it. Less than that, under this Statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense."

The Court further said:

"The record shows neither such evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict, nor so 'obvious' or 'apparent' a danger as would do so."

And the Court further said:

> "If there was negligence by the Respondent, the Statute requires something more than contributory negligence to defeat recovery, although that may minimize the damages. The jury found this issue in favor of the plaintiff, and the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that."

In its second opinion the Supreme Court of Nebraska cites and quotes from the case of *Morris* v. *Pryor*, 272 Mo. 350, 198 S. W. 817, 821. After stating that it is a case almost identical with the one at bar, it further said:

> "As much as we pity the respondent, whose heedlessness in a work requiring constant watchfulness, has brought upon him this injury, we cannot see that the appellant, by negligence, has contributed to it in any degree."

An examination of that case discloses that it has many distinguishing features from the case at bar; the case was decided December 1, 1917; the plaintiff was a switchman of 19 years' experience; it was neither necessary, proper nor customary to work on that side of the track where he was injured; he had completed his work on that side of the train where he was injured and unnecessarily remained there; the spur track in that case served two different industries; a 30 degree curve in the track was involved; there was nothing in the testimony that explained why plaintiff went in on that side of the car to do coupling; the engineer could not be seen from either side and it was customary to work on the other side, that is, the outside of the curve, which was the safe side. The Court concluded in that case

that defendant was not negligent because plaintiff assumed the risk. That case clearly on its facts does not control the case at bar, and is further rendered impotent by the 1939 Amendment of the Employers' Liability Act which wiped out the defense of "assumption of risk."

Its citation by the Nebraska court is further evidence of the confusion of that Court in dealing with a case arising since the assumption of risk was abolished.

In *Illinois Central R. Co.* v. *Shinners, Admx.*, 97 S. W. 552, where deceased, while working as an inspector in a railroad yard, stumbled and fell over a jack block immediately adjacent to one of the rails, the plaintiff recovered a verdict, and on appeal the Court pointed out that *failure to choose a safe way instead of the unsafe way is no more than contributory negligence and does not bar recovery under the Federal Employers' Liability Act.*

A consideration of the cases in which this Court has held that an employee's negligence was the sole cause of his injury or death emphasizes that the case at bar is not subject to such a holding.

In *Southern Railway Company* v. *Youngblood*, 286 U. S. 313, cited by the defendant, it was held:

> "Failure of a railroad conductor to obey a written train order to pass another train at a stated point, in consequence of which a headon collision occurred, in which he was killed, was the sole cause of his injury and death."

In *Southern Railway Company* v. *Danzler*, 286 U. S. 318, a companion case to the Youngblood case, it was held that—

> "failure of a railroad engineer to obey the same written train order was the sole cause of his death."

Frese v. *C., B. & Q. R. R. Co.*, 263 U. S. 1, is a case where the engineer was killed in a collision which resulted from

his failure to stop his train at a grade crossing with another railroad, and it was there held that the engineer's violation of the statute was the sole cause of the accident, and no recovery could be had for his death.

At the time petitioner was injured he weighed about 175 pounds and was about 5 ft. 11 in. tall. (R. 52).

Plaintiff's Exhibit II (R. 56A) is a picture showing a portion of the wall of the Casein building; as you look into the picture the view is toward the south; the rail running diagonally between the two rails of the Casein Spur Track is a part of an abandoned track; the lowest white spot on the building wall is a sun spot and that is the place where petitioner was caught and injured; that is also the approximate location of where indentations were made in the building wall when he was crushed between the side of the car and the building wall. (R. 53-56 incl.).

Plaintiff's Exhibit III (R. 58A) is a picture of the same location but in this picture, as you look into it, the view is somewhat toward the north and east. The man shown in the picture is petitioner showing approximately his position and location at the time of the accident. (R. 57-58 incl.).

Plaintiff's Exhibit IV (R. 62A) is a picture showing the same general location as Exhibits II and III, the view being somewhat to the southwest (R. 59). The picture shows the Casein Spur Track, as well as the abandoned track which formerly extended to the Continental Can Company building, also shown in the picture. (R. 59-61, incl.); location of tracks and buildings was the same as at the time of the accident. (R. 61-62).

Questioned by defendant's counsel as to whether or not he took any precautions for his own saftey, he said: "Assuming it was a safe place to work, there wasn't any reason for taking any precautions." (R. 101). Petitioner's discovery deposition was taken on March 6, nearly a year after the accident, which occurred March 15, 1943. After

the accident he visited the scene of it three or four times. (R. 125). The entire testimony of Mr. Ellis warrants the inference that much of the knowledge sought to be charged against him in respect to the danger attending his work at the time of the accident, was gained by him by reason of observations made by him long after the occurrence of the accident.

Plaintiff's Exhibit XII (R. 132A), an industrial record prepared by plaintiff in the course of his duties, shows, with the testimony, that petitioner and his crew had assembled eight other cars which were temporarily left on another track while the crew went over to the Casein Spur Track with a light engine to pick up a car off the Casein Spur Track; the crew was making up a train of cars and there was more work to be done in addition to picking up the car which was to be taken out of the Casein Spur Track and assembled with the others and respotting the car involved in the accident; they also had some work to do for King County; the work, of course, was interrupted by the accident (R. 133). Petitioner at no time made any close or particular observation or inspection of the conditions existing at or about the vicinity of the accident (R. 134). There was nothing to indicate to him that the place of work was unsafe; he had not been warned against the danger and had no knowledge of it. His mind was occupied with his work. Questioned as to whether his mind was occupied with anything, he said:

> "It naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it." (R. 134).

Had plaintiff known of the danger or appreciated it, he certainly would not have remained in the place where he was injured; the instinct for self preservation speaks strongly that he did not know and appreciate the danger.

ous position he was in. His negligence, if there was such, was merely contributory; it was not the sole cause of his injury; that trial court and jury have said so.

United States Supreme Court Not Limited to Consideration of the Evidence as Stated in the Opinions of the State Court

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court *Great Northern Ry. Co.* v. *State of Washington*, 300 U. S. 154, 81 L. ed. 573; *United Gas Public Service Co.* v. *State of Texas*, 303 U. S. 125, 143, 82 L. ed. 702; *Chicago Great Western R. Co.* v. *Rambo*, 298 U. S. 99.

Petitioner, therefore, prays that this Court issue its writ of certiorari herein and that the final judgment of the Supreme Court of Nebraska rendered herein be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946

No. 320

NEWTON W. ELLIS

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

—o—o—

October Term, 1946

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No. 320

—o—o—

NEWTON W. ELLIS,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

—o—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—o—

FOREWORD

The Petition for the Writ, filed herein on July 22, 1946, and served upon counsel for Respondent with the printed Record on September 25, shows but little consideration for this Court or the Supreme Court of Nebraska. Except for appropriate headings and arrangement, neither the Petition nor its supporting brief appears to have been "carefully prepared * * * with *studied accuracy, brevity*

and clearness" to present what is essential to ready and adequate understanding of the points requiring the attention of this Court. *Furness-Withy & Co., Ltd., v. Yang-Tsze Insurance Association, Ltd.*, 242 U. S. 430, 434. The so-called "summary statement of the matter involved," found in the Petition at pages 3-33, is not accepted as an accurate statement of the facts by Respondent. It, as well as much of Petitioner's argument, is a superficially plausible mixture of fact, fiction and omission, which creates a distorted impression of the undisputed evidence presented by the Record. It appears to have been presented in this manner by Petitioner with the expectation that this Court would confine its study to the Petition and supporting brief, and that the demonstration of its inaccurate and misleading character would have to await a determination of the merits. This demonstration may be easily made at this time by a careful comparison of Petitioner's statement of the facts with the statements of facts as contained in both of the opinions of the Nebraska Supreme Court (R. 342-355; 376-390). We shall not, however, put the entire burden of making that comparison upon this Court, but shall point out by specific reference to the Record that each statement of fact contained in either opinion of the state Court which has been challenged by Petitioner as unsupported by the evidence or as a usurpation of the jury's function is not subject to the criticism made. In the interest of clarity and brevity, however, this can best be done in connection with the argument directed to what we perceive to be the questions actually presented to this Court by the Record.

JURISDICTION OF THIS COURT

Respondent agrees with the statements made concerning the Record, as set forth in the Petition (p. 33) under

this heading, except that any right was denied Petitioner, and of course does not question the applicability of Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (28 U. S. C. A., Section 344) to this case, in which it was stipulated that the Federal Employers' Liability Act (45 U. S. C. A., Section 51, et seq.) governed.

Solely for the benefit of this Court we feel obligated to point out that the Record fails to contain the "Judgment" of the Supreme Court of Nebraska entered July 20, 1945, as distinguished from its opinion (R. 342). The "Judgment" entered by the Supreme Court of Nebraska on March 22, 1946 (R. 376), provides that "* * * said former Judgment of this court entered herein on July 20, 1945 be, and hereby is, adhered to, and that said motion of appellee for a rehearing be, and hereby is, overruled and a rehearing herein is denied." It appears, therefore, that the judgment actually sought to be reviewed is the Judgment of July 20, 1945, which is not set forth in the Record, and not the Judgment of March 22, 1946, as stated by counsel at the outset in the Petition (pp. 1-2).

THE QUESTIONS PRESENTED

The question (or questions) actually presented is—was there substantial evidence adduced which would justify the trial Court in submitting to the jury the question of whether Respondent (defendant) was guilty of a failure to exercise ordinary care:

(a) With respect to providing and maintaining for Petitioner a reasonably safe place in which to work?

(b) With respect to a failure to warn Petitioner of the danger or likelihood of being caught and in-

jured between the side of the car and the Casein Building?

(c) With respect to the failure of the engineer to keep a proper lookout or to properly control and direct the movement at and prior to the time of the accident?

These, in substance, are the questions first presented by the Petition for the Writ (p. 35). They were likewise the questions presented to the Nebraska Supreme Court in Petitioner's (appellee's) motion for a rehearing (R. 382) and those first referred to in this Petition (p. 7) and in the argument in support thereof (p. 51). Questions numbered 2 and 3 (pp. 35-36) are merely argumentative elaborations of the questions presented in No. 1. Question No. 4 (p. 37) presents for the most part matters which necessarily inhere in the first question presented. Respondent concedes that Petitioner's negligence would not be the "sole" proximate cause of his injuries if there was negligence upon the Respondent's part which proximately contributed to causing the accident. This question as framed is likewise argumentative and does not properly reflect the basis of the determination made by the State Supreme Court that Petitioner's negligence was the sole proximate cause of the injuries which he received. The true basis for that determination is found in a consideration of Petitioner's own admissions and other wholly undisputed evidence briefly summarized in each opinion as follows:

"As already pointed out he was not required, in the performance of his service for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own.

"The evidence of plaintiff must be accepted the effect of which is to say that he was not in fact aware of the danger. Was the danger then under the circumstances of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not the plaintiff was guilty of negligence which was the proximate cause of the accident. (R. 352)

"He gave the signal for the movement, then not seeing the brakeman who was to give a signal for the spotting of the car he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught.

"Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care the danger would have been obvious. (R. 355)

"Plaintiff himself testified that he made no attempt at any time to see where the car was coming or to observe the distance between the inside of the car and the side of the building. He admits that he was familiar with the fact that the car would overhang most in the center of the inside of the curve which was directly in front of him and that the narrow distance between the building and the car at the point of injury was open and apparent to him at all times. Yet plaintiff admits that he took no precautions for his own safety and made no observations or effort at any time to try to save himself from injury. (R. 384)

"It was not necessary for plaintiff at any time to see or contact fieldman Brown who then stood on the Cas-ine platform to the south. The evidence of plaintiff's witnesses is conclusive that all plaintiff needed or was required to do was cause the engineer to move backward until he, the engineer, could see and take signals from Brown. It was not necessary for plaintiff either to give or to receive any signals from Brown who did not enter the picture until the car came around the curve far enough for him to contact the engineer and by appropriate signals spot the car at the platform. Plaintiff not only could have stood on the west side of the tracks to give the signals required of him but he could have stood on the east side at any point on Myrtle Street up to the Casein building and there controlled the actions of the engineer until the engineer could see Brown and contact signals from him. The plaintiff in performing his duties was not necessarily occupying the place or position where he was at the time of the injury. It was neither customary or required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined." (R. 386)

Respondent emphatically denies that Question No. 5 (p. 37) is presented by this Record. The Nebraska Supreme Court did *not* hold "in effect, that there was no negligence on the part of defendant because plaintiff was negligent and voluntarily assumed the risk," as stated by Petitioner. The first opinion (R. 342-355) did not mention "assumption of risk." It was concluded as follows:

"It follows therefore that, the plaintiff having failed to prove any of his charges of negligence, the court erred in submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence which was the proximate cause

of the accident, or to pass upon other errors assigned as grounds for reversal" (R. 355)

The "supplemental opinion," after referring specifically to Section 4 of the Federal Employers' Liability Act, as amended (45 U. S. C. A., Section 54), reads:

> "Similar cases were complicated by judicial construction before the 1939 amendment but thereafter they are comparatively simple. In other words, it has now been held that assumption of risk as a defense has been taken out of the act if defendant is negligent; that is, now the employee does not assume the risk of those dangers in his employment which are caused by or result from defendant's negligence. However, it is as important to remember that the employee still assumes the risk of those ordinary dangers in his employment which are naturally inherent in the business and not caused by or the result of defendant's negligence." (R. 380)

This is, of course, what the amended act now provides and is the correct rule and it is not otherwise contended by Petitioner. His criticism is not directed to any claimed inaccuracy in that statement of the existing rule, but rather to its mere mention in the opinion, from which it is fallaciously argued that the State Court misconceived the effect of the amendment and the controlling decisions of this Court and thereby denied a recovery. That it was mentioned at all in the "supplemental opinion" was probably due to Petitioner's insistence in his motion for rehearing (R. 358, "16.") and brief in support (R. 363-364) that the Court had misconceived the effect of the 1939 amendment to Section 4 of the Act and the decisions of this Court construing it. The "supplemental opinion" shows clearly that the contention then and now made by Petitioner is not justified and that no such question is actually presented.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

What we have said above with respect to the "Questions presented" should be considered by this Court as showing that Respondent does not approve or agree with Petitioner's assigned reasons in the form made (pp. 38-43). The reasons assigned are likewise prolix, repetitious and argumentative, and as pointed out above, the Record does not justify the claim made in "Reason V" (p. 42) that the State Supreme Court "ruled, in effect, that plaintiff assumed the risk of his injury, * * *" unless such statement is qualified by adding "when he alone was negligent and when the defendant was not negligent."

ARGUMENT

Before proceeding specifically to the argument addressed to the only questions which we believe are actually presented by the Record, it is proper to point out that Petitioner has studiously avoided mention of most of his own testimony given on cross-examination, which explained, qualified, modified, and in some instances repudiated the testimony relied upon and specifically called to this Court's attention. It is also proper to point out that Petitioner has failed to advise this Court that all of the testimony contained in this record and given by the engineer, G. J. Buzard (R. 169-203), the fieldman, J. C. Brown (R. 203-222), the Assistant Superintendent, H. B. Coburn (R. 238-242), is from the depositions of those witnesses which were taken and offered in evidence by Petitioner (plaintiff). The same is true with respect to some of the testimony of the General Yardmaster, Melbourn H. Estes (R. 222-238), although this witness later testified in behalf of Respondent concerning other matters

(R. 322-341). The testimony of these witnesses, which was offered in evidence by Petitioner, is wholly unimpeached and likewise uncontradicted, except slightly in a very few minor particulars. Petitioner, however, in an effort to persuade this Court that a question for the jury was presented, draws many unreasonable and unjustified inferences which do violence to the undisputed evidence of plaintiff himself and his own witnesses. Support for these general observations will be found in the discussion of the evidence.

It is an established rule of practice in the Courts of the State of Nebraska that "a party is ordinarily bound by the testimony of his own witnesses on the question of negligence, unless the circumstances or the evidence of other witnesses would warrant the jury in disregarding such evidence."

Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030, 1032.

Ross v. Carroll, 138 Neb. 1, 291 N. W. 726, 729.

The discussion of the evidence adduced will demonstrate that the rule and not the exception controls in this case. While this rule was not specifically referred to by the Nebraska Supreme Court in this case, its existence no doubt accounts, at least in part, for the emphasis given to the fact that the witnesses, Buzard and Brown, were Petitioner's witnesses and that their testimony, as well as the other undisputed evidence, did not permit inferences to be drawn as Petitioner contended, which were directly opposed to the facts.

It is, of course, well settled that local rules of practice and procedure having general application in the State

Courts have a like application in the suits brought in the State Courts under this Federal statute.

Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 559, 603.

Central Vermont Ry. Co. v. White, 238 U. S. 507, 511.

Minneapolis & St. L. R. R. Co. v. Bombolis, 241 U. S. 211.

Louisville & N. R. R. Co. v. Stewart, 241 U. S. 261.

Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 316.

Dickinson v. Stiles, 246 U. S. 631, 633.

I.

There Is No Substantial Evidence of a Negligent Failure to Provide a Reasonably Safe Place to Work.

The duty of the employer in this respect is of course to exercise ordinary and reasonable care to provide his employees with a reasonably safe place in which to discharge their duties. There are necessarily two inherent qualifications. The first is that negligence does not exist if ordinary and reasonable care is exercised by the employer. The second, which to some extent inheres in the first, is that the place must only be "reasonably safe," not absolutely safe. The duty existing is constant, but the accomplishment of its discharge expands or contracts in the light of the surrounding circumstances. This is necessarily so since reasonable and ordinary care is determined from a consideration of the surrounding conditions and "reasonable safety" is also a relative term. Furthermore, the determination of whether this duty has been discharged must be made in recognition of the right of the employer to assume that his mature and normal employees will exercise ordinary care for their own safety. In other words, the employer, whether at common law or

under the Federal Employers' Liability Act, has the right to assume that the employee will make a reasonable and proper use of his own faculties to avoid unnecessary risks of injury. The employer's duty, therefore, to exercise ordinary care in providing a reasonably safe place to work does not require him to anticipate negligence upon the part of his employees and to protect them against the effect of their own negligence. *Restatement of the Law of Torts*, Section 290, comment b, p. 778; *State of North Dakota v. Great Northern Ry. Co.* (8th Cir.), 155 Fed. (2), 1005, 1008; *Haring v. Great Northern Ry. Co.*, 137 Wis. 367, 119 N. W. 325, 328; *Morris v. Pryor*, 272 Mo. 350, 198 S. W. 817, 821; *Hogan v. New York Cent. & H. R. R. Co.* (2nd Cir.), 223 Fed. 890, 893; *Hogan v. New York Cent. & H. R. R. Co.*, 209 N. Y. 20, 102 N. E. 555; *New York, N. H. & H. R. Co. v. Dailey* (2nd Cir.), 179 Fed. 289; *Baltimore & O. R. Co. v. Newell* (3rd Cir.), 196 Fed. 866, 869; *Canadian Northern Ry. Co. v. Walker* (8th Cir.), 172 Fed. 346, 350; *Davis v. Hand* (8th Cir.), 290 Fed. 73, 78.

The employer is not an insurer of the safety of his employees while they are on duty. Liability under the Federal Employers' Liability Act is dependent upon the establishment of the employer's negligence and not merely injury. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484. The right of the employer to assume that his employees will exercise ordinary care for their own safety when providing the place of work or while otherwise regulating his own conduct is inherent in the ascertainment of whether he has discharged the duty owing, in other words, in determining his negligence. The right to entertain this assumption therefore remains as long as negligence continues to remain the foundation of his liability. This assumption therefore is wholly different from "assumption of risk" which, as rightly understood, is a matter of de-

fensive confession and avoidance, and which prior to the 1939 amendment had the effect (except in certain cases) when established, of insulating the employer from liability even when the employer was guilty of negligence. The distinction between the two assumptions is therefore readily apparent, although the Courts were not always careful to make the distinction so long as the ultimate legal consequence was identical. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 68, 73; *Owens v. Union Pacific Railroad Co.*, 319 U. S. 715, 720.

One must also keep in mind, if confusion is to be avoided, that the employer's right to entertain the assumption here referred to is implicit in the exercise of ordinary care on his own part. Whereas the employee's failure in fact to exercise due care for his own safety does not necessarily control or affect the question of the employer's negligence and therefore may produce a wholly different legal consequence. In the first instance, the entertainment of the assumption by the employer may be sufficient under certain condition, as in this case, to establish that due care was exercised in the discharge of its duty. In the second instance given, the employee's negligence, in fact, may have no relationship to the employer's freedom from negligence, although the ultimate legal consequence may be the same in each instance or may be wholly different. Here, again, fundamental and valid distinctions in legally different concepts may be erroneously ignored if confused with the ultimate legal consequence.

It appears to us that counsel for Petitioner have failed to appreciate, or have chosen to ignore, these distinctions and hence misconceive and misinterpret the meaning and effect of those parts of the opinions of the Nebraska Supreme Court which are quoted and critically discussed on

pages 70 to 76 of Petitioner's brief. When the first opinion (R. 342-355) is read as a whole and considered with the "supplemental opinion" (R. 377-390) as intended, and particularly that part of the latter shown in the Record at pages 385-386, it is clear that the Nebraska Court was referring to Petitioner's failure to adduce any substantial evidence showing that Respondent, while discharging its duty to provide a reasonably safe place of work, was not entitled in the present situation to rely upon the assumption that due care would be exercised by its employees, and particularly Petitioner. It was that burden of proving the departure from ordinary care on Respondent's part, which the Court said Petitioner had failed to sustain (R. 355) and not Petitioner's freedom from contributory negligence in fact as stated and argued by Petitioner's counsel (pp. 75-76). Furthermore, the Nebraska Supreme Court, as distinguished from Petitioner's counsel, did not confuse "assumption of risk" in its true sense with non-negligence and did not infer, hold or decide this case, as contended by Petitioner, on the ground that he assumed any risk resulting from Respondent's negligence.

We shall not burden this Court with a complete statement of the evidence, which would appear to be unnecessary, and we shall avoid, so far as possible, repeating that part of the evidence set forth in the Petition and Brief in support which has been fairly and accurately presented. Such evidence will be referred to only when it is necessary to a better understanding or to avoid misrepresentation, distortion, false impression or confusion.

A. Physical Characteristics and Location

In general the parties agree that most of the material physical characteristics involved are accurately shown up-

on the drawing or plat identified as Exhibit 1 (R. 26A). The photostatic copy of this exhibit, which by stipulation has been reproduced in the printed Record, was, however, considerably reduced in size from the original exhibit and as so reproduced is no longer accurate with the scale shown by which the original exhibit was prepared. It is, however, relatively consistent. Petitioner's explanation of the *locus in quo*, found commencing near the middle of page 9 of the Petition and extending to the end of that paragraph, is accepted. The parties are also agreed that the photographs offered by Petitioner, which were taken in April, 1944 (R. 55), being Exhibit 2 (R. 56A), Exhibit 3 (R. 58A), and Exhibit 4 (R. 62A), and offered by Respondent, Exhibit 40 (R. 326A), Exhibit 41 (R. 328A), Exhibit 42 (R. 328B), were taken two days after the accident occurred, or on March 17, 1943 (R. 325-328). and Exhibit 11 (R. 124A), Exhibit 43 (R. 332A), and Exhibit 44 (R. 332B), were taken December 3, 1943 (R. 330-332), accurately portray (except for the sun spots in Exhibit 2 (R. 56A) that part of the premises and objects shown therein as they existed at the times the respective photographs were taken. In any event, there is no evidence to the contrary. The freight car shown in the pictures taken March 17, 1943 (Exs. 40-42), is located in the same position as when Petitioner was caught between it and the west wall of the Casein Warehouse at approximately 7:00 P. M. (Pacific War Time), March 15, 1943 (R. 199, Qs. 2289-2291; Qs. 2325-2331; R. 202; R. 218, Qs. 2484-2486; R. 232, Qs. 2637-2641; R. 325-327, Qs. 3468-3500). This car was of standard length and width for an automobile car (R. 229, 233). Cars of the same size were handled daily and were not restricted to transportation of automobiles or to use upon particular tracks or industries (R. 233-234). At the time the accident occurred, cars of the

same dimensions were in use almost as frequently in this industrial zone as were cars 40 feet in length (R. 182-183, 209). This car was in all probability empty at the time the accident occurred, although the doors on each side were then closed (R. 229, 246, 217, 232). There was absolutely no evidence from any one that the car was overloaded, out of repair or bulged, as alleged in Petitioner's initial Petition (R. 3), and the trial Court did not submit those issues to the jury in any instruction given (R. 9-17).

The tracks had been in the same location for at least ten years, although the Casein Warehouse building had been reconstructed since that time (R. 224, Q. 2535; R. 228, 240). The west or outside rail was slightly higher than the inside rail where the track was curved, as is characteristic and proper on all such tracks (R. 230, 237-238). On the day the accident occurred the track and roadbed were in apparent good condition and there were no unusual lateral or swaying movements of the car which in any manner influenced the amount of clearance between the side of the car and the building (R. 225, Q. 2559; R. 196, Qs. 2255-2256; R. 209-210). Petitioner, referring to the day the accident occurred, testified:

"1087 Q. During all the time on that day when you had been upon or around the Casein Spur track in conection with the movements going out and the car coming back in, the cars had always operated smoothly, so far as you observed?

A. That is right.

1088 Q. You didn't at any time observed any of the cars listing or pitching or lunging, or anything of that sort?

A. No." (R. 101)

There was no evidence to the contrary as respects the time or the day when the injury occurred. The testimony of the witness, Christensen, which is referred to and quoted in part on pages 28-29 of the Petition, referred to his observations made on some other occasion, the time of which was not definitely fixed, when different equipment operated by a different crew apparently following some period of heavy precipitation were observed upon a different part of the spur track near the Casein Spur switch where this witness said he was then stationed (R. 148-155). He had been in that vicinity "maybe once" before Petitioner was injured, and on three or four occasions in all (R. 154-155).

The official weather record (R. 248A) shows that during the first fifteen days of March, 1943, there was no recorded precipitation at Seattle until March 8th, when a "trace" was recorded, then none until March 12th, when there was .06 of an inch, a like amount on March 13th, a trace on March 14th and a trace on March 15th, which fell after the accident occurred (R. 247-248B). The sun set on that day at 7:14 P. M. (Pacific War Time) and visibility was good at the time the accident occurred (R. 247, 84 129, 188). None of the crew, including Petitioner, had been using his lantern (R. 134, 216-217).

A clearly legible sign reading "IMPAIRED CLEARANCE" had been continuously maintained near the northwest corner of the building and between the Casein Spur track and building for a period of many years (R. 185, 217-218, 222, 241). It was so located and legible at the time the accident occurred, and its presence was discussed by the crew shortly thereafter (R. 186, 201, 222). There is no substantial evidence to the contrary. Petitioner's testimony that he observed no such sign prior

to August, 1943, must be considered in the light of his persistent denials that he had ever been in upon the spur track before March 15, 1943, and his assertion that on the day the accident occurred he was "nowhere near it" and never looked for any such sign (R. 139-140). Under these circumstances his testimony that he did not see the sign does not tend to establish its absence and fails to achieve even the dignity of negative evidence. *Spreitler v. L. & N. Ry. Co.* (7th Cir.), 125 Fed. (2) 115, 116; *State of North Dakota v. Great Northern Ry. Co.* (8th Cir.), 155 Fed (2) 1005, 1008.

The testimony of Christensen that he did not see the sign until some time in May following the accident has no more probative effect, since he could recall only faintly at best having been there once previous to the day of the accident. His failure to observe the sign shown in the photograph taken March 17, 1943 (Ex. 40, R. 326A), prior to the latter part of May, is much more persuasive of his absence from the vicinity until that time or of faulty observation than of the absence of the sign. The testimony of Petitioner and this witness with respect to the fresh dirt about the base of the pole, the absence of grass or weeds in that particular area, the absence of rust or other indications of deterioration and the appearance of freshness of the paint on the sign and its standard, is remarkably similar in view of the fact that Christensen claimed he made these observations some three months before Petitioner states he observed the same conditions. The photographs in evidence, particularly those taken December 3, 1943, which show the lower part of the base of the pole (Ex. 11, R. 124A; Ex. 44, R. 332B), completely refute Petitioner's claim that no grass or weeds were growing about the base of the pole the preceding August, and further show that sign to be identical in

appearance and location with the sign shown in photograph taken March 17, 1943 (Ex. 40, R. 326A). But assuming *arguendo* that Petitioner's testimony and that given by Christensen with respect to the appearance of the sign when observed by them in August and May, respectively, is entirely true, it wholly fails to even indicate the absence of the sign on March 15th, or prior thereto, and tends to prove only that for some reason a new sign, or at least a new standard, was set in the same location some time between March 17th and the latter part of May, 1943.

This evidence, therefore, does not raise an issue of fact or justify the inference that the sign was not present in view of the affirmative, unimpeached and uncontradicted testimony of Petitioner's own witnesses (Buzard, Brown and Coburn) that the sign was present and clearly legible at the time Petitioner was injured. The other evidence relating to this issue given by Respondent's witnesses, Murphy (R. 308-311), Field (R. 318-319), and Estes (R. 323-324), was likewise positive, unimpeached and uncontradicted and therefore does not permit a contrary inference to be drawn, as Petitioner contends. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 340.

Though Petitioner contended throughout the trial that he had neither seen nor had any opportunity to see the sign before he was injured, his own testimony shows that he had many opportunities to see it, as we shall later point out. However that may be, the fact that this sign, or at least a like sign, had been continuously maintained in the same location for many years is conclusively established by the wholly undisputed testimony of Petitioner's own witnesses. Its existence, therefore, must be conceded and it necessarily follows that Respondent would be jus-

tified in assuming that the information and warning proclaimed by it would be observed and heeded. The maintenance of this sign is therefore an important although not necessarily a decisive factor in establishing that Respondent did exercise ordinary care in furnishing a reasonably safe place for its employees to work while engaged in handling cars to or from the Casein plant.

B. Petitioner's Experience and Admitted Knowledge of the Conditions Creating the Danger

Counsel for Petitioner have pointed out in a general way (pp. 8-11) some of the evidence relating to this matter, which we shall not repeat. The statements there made are, however, somewhat misleading because of omissions of undisputed evidence, inaccuracies, and the failure to mention other testimony given by Petitioner himself which explained, qualified, and in some instances directly repudiated the testimony given by him on the same subjects during his direct examination. For example, Petitioner's statement omits mention of the fact that Petitioner admitted that during the time he was employed by Respondent he had been engaged in "switching operations generally throughout the industrial district where (Respondent) handles the switching" (R. 74-75, Qs. 563-566). Petitioner also admitted that before being promoted to foreman he had pretty much devoted his time in working both as fieldman and pin puller. As fieldman he, in accordance with the normal procedure, accompanied the foreman in on industrial tracks when cars were being picked up or delivered, and as pin puller would operate the switch into such tracks when using a light engine (R. 72, 73, 87-88; Qs. 534-549). He likewise admitted he was assigned to a shift that started at 2:30 P. M. when he worked under Foreman Murphy on the Myrtle Street track (among others), which serves the Casein Co. (R.

75). That every time he was on the Myrtle Street track it was for the purpose of picking up or delivering a car to the Casein Co. (R. 78-79). That he had been on the Myrtle Street tracks on three or four occasions while Murphy was his foreman during the period from July to October, 1942 (R. 117-118). That there was only one way for the engine or cars to get on to the Casein Spur track and on the previous occasions they had gone in just as they did on the day the accident occurred (R. 121-122; Qs. 1283-1291). He then testified:

"1292 Q. And when you testified that you had not been in there between the four times you were in there in the summer of 1942, and up until the day you got hurt, what were you referring to as being in there?

A. I meant that if I did go in there, the engine would have to go in that way.

1293 Q. And where did you mean by there?

A. The Casein Spur, if they went in there." (R. 122.)

He started serving as an acting foreman in the summer of 1942 and so acted with greater frequency as time went on and before he was promoted to foreman on February 4, 1943 (R. 76, 224). As foreman and acting foreman he made out industrial records identifying the cars and showing the time when they were picked up or delivered on industrial tracks (R. 76-77). These industrial records are made out by all foremen in the usual course of their duties and show the names of the helpers and starting time of the shift worked by the crew and on completion are turned in to the yard office (R. 129-131). Petitioner's Exhibit 12 (R. 132A) is the industrial sheet made by him the day the accident occurred (R. 129).

It may be observed here that this record is identical in form and purpose with the industrial sheets (Exs. 15-39) made out by Murphy when he was foreman of the switching crew of which Petitioner was a member, which was engaged in handling cars to and from the Casein plant from July 15 to October 19, 1942 (R. 249-306). Similar records (Exs. 20A, 45-47) made out by other foremen or acting foremen, showing Petitioner to be a member of the crew similarly engaged, were identified by Mr. Estes and received in evidence without objection (R. 334-338, Exs. 20A, 45-47; R. 336A-338C).

These exhibits, as reproduced in the printed Record, are not clear and in many the processes of reproduction employed have made it difficult, if not impossible, to see that on each sheet Petitioner's name appeared as a helper and the word "Casein" and the time of handling the movement there also appeared clearly upon the exhibits as originally offered. Fortunately, these facts appear in the testimony of the two witnesses (Murphy, R. 249-306; and Estes, R. 334-338), who identified these records, and counsel for Petitioner, when referring to these records (p. 31), do not contend otherwise.

Petitioner did not dispute either the accuracy or authenticity of any of these records. In fact, his own testimony concerning the making of such records by himself and other foremen supplied to a large extent the essential foundation for their admission. Briefly summarized, these records show Petitioner to have been a switchman helper with the switching crews which, during the period from July 15 to October 19, 1942, and while he was on the 2:30 P. M. shift, handled cars on 29 different occasions from or to the Casein plant. On 27 of these occasions (all except tank cars) the handling of the cars in-

volved movements on the Casein Spur track in addition to the Myrtle Street track, and all except five of the total cars handled were handled during daylight hours (R. 251-299, 335-339). Petitioner admitted that Murphy was his foreman during that period and that he probably was on the Myrtle Street track during that time (R. 118-119).

In the petition on page 31 it is stated:

> "Plaintiff, however, had testified that in working in the industrial district the full crew did not always accompany the engine into each and every industrial track."

No reference is made to the Record to support this statement and Respondent submits that it has no support in the Record. If this statement was made for the purpose of implying that Petitioner did not accompany the crews of which he was a member while they were engaged in switching cars to or from the Casein Plant, it is directly contrary to the undisputed testimony of Murphy (R. 303-304).

For reasons not clear, counsel for Petitioner have several times stressed the statement that Petitioner did not work *in* on the Casein Spur before he was injured. Surely his knowledge of the obvious physical conditions on and along that track would be the same whether he worked *in* or *out* of the track. The crew of which he was foreman at the time the accident occurred were engaged in picking up as distinguished from delivering a car (R. 33). The respotting of the car which was not to be taken away was a normal incident when picking up a car at that location, according to Murphy (R. 304-305), and not contradicted by anyone. Petitioner testified that before the accident occurred he knew every material move which would be made, because the procedure

which was to be, and in fact was, followed was the "normal way" on any similar track (R. 92).

While the industrial records prove conclusively that Petitioner had been engaged on and about the Myrtle Street and Casein tracks with much greater frequency than he was willing to admit, the State Supreme Court did not predicate its decision, even in part, upon that evidence, but resolved that issue (erroneously, in our opinion) in favor of the Petitioner (R. 351). Its decision and opinion, so far as predicated upon Petitioner's knowledge of the situation and his correlative obligation to avoid the obvious and unnecessary danger incident to working between the track and the Casein building at the point of accident, is sustained by other wholly undisputed evidence, most of it the testimony of Petitioner concerning his admitted knowledge and opportunities for observation previous to the time of, but on the day the accident occurred.

A material portion of the foundation for Petitioner's contention that he had no knowledge of the impaired clearance sign, curvature of the Casein Spur track and the close clearance which existed rests upon his testimony alone, given on direct examination, that he was riding the rear footboard of the engine at the time it came in on to the Myrtle Street track and that he alighted when the engine came to a stop at switch "E" (Petition, p. 10). Petitioner was asked to and did trace the course on Exhibit 1 (R. 26A) as from "A" to "B," which he said he followed in going to the two cars then on the Casein Spur track to ascertain which one was to be picked up (R. 35). This course, if followed, would have kept him away from the front of the Casein plant, the Casein Spur switch and the impaired clearance sign, also shown upon

this exhibit, while going to the cars. The probative effect of this testimony and the other inferences which it would justify were, however, utterly destroyed by his own admission on cross examination. He then testified:

"627 Q. Do you remember on this occasion after you left Marginal Way whether you were riding on the footboard, or were you up in the gangway of the engine?

A. No, I don't.

628 Q. Do you remember any time after you left there, some place where you were riding on the engine?

A. No.

629 Q. Do you have any distinct or definite recollection at this time at all of the place where you were riding when the engine got down here on the Myrtle Street track in front of the Casein building?

A. No, not distinctly, no.

630 Q. You wouldn't say one way or the other, whether at the time the engine got down here you were riding up in the engine, on the gangway, or whether you were riding on the footboard?

A. I imagine it would be on the footboard.

631 Q. But you don't recall?

A. No, I do not.

632 Q. Now the switch you have referred to on this plat and marked 'Switch E,' that switch was always lined for the Myrtle Street track, wasn't it?

A. I don't know.

633 Q. Do you recall whether on this occasion, as you came in, it was lined for the Myrtle Street track?

A. I don't know whether it was or not, but I imagine it was.

634 Q. Why do you say that?

A. Well, it should be.

635 Q. You don't have any recollection of the engine stopping for anybody to get out and line the switch, do you?

A. No.

636 Q. Where was the first place that you recall at all, Mr. Ellis, of the engine coming to a stop after coming in on the Myrtle Street track that afternoon?

A. I don't know when it did first come to a stop.

637 Q. Don't you recall that the engine did not come to a stop until it had proceeded east beyond the switching point?

A. No, I don't know whether it did or not.

638 Q. Of course it was necessary for the engine to come to a stop there, was it not?

A. To stop where?

639 Q. East of the Casein Spur switch?

A. Yes it was.

640 Q. Of course, if it hadn't stopped there it never could have backed into the Casein Spur; that is right, isn't it?

A. That is right.

641 Q. There wouldn't have been any purpose in bringing the engine to a stop until the engine had proceeded to the east of the switch, would there?

A. Yes.

642 Q. For what purpose?

A. To look at the cars to see if we should go any farther in after them.

643 Q. But you don't have any recollection that the engine did stop?

A. No, I couldn't say that it did." (R. 80-82.)

Accordingly it appears that Petitioner's testimony given at the trial, upon which he now relies, proved nothing—as to his alighting from the footboard or the engine stopping at switch "E". His repudiation of this testimony given on his direct examination is not merely a matter affecting credibility. Such inconsistency entirely nullifies the testimony given on direct examination and wholly destroys its probative effect. *U. S. v. Kiles* (8th Cir.), 70 Fed. (2) 880, 883; *Slacum v. Jolley,* 153 Md. 343, 138 At. 244, 248; *U. S. F. & G. Co. v. Continental Baking Co.,* 172 Md. 24, 190 At. 768, 772; *Butler v. Reed-Avery Co.,* 48 At. (2) 436, 440 (Md., 1946).

Under these circumstances the testimony given by Petitioner on the same subject in his deposition taken two months before the trial (R. 74) has special significance. He then testified that, as the engine proceeded "on the Myrtle Street track in an easterly direction, we had to go over a switch—east beyond the switch (at which time) I imagine I was on the engine, I don't remember whether I was right on it, * * * that would necessarily put (me in

a position) east and north of the Casein Spur" (R. 82). He also testified: "I don't recall which side of the spur I walked back along (to check the tags). I imagine it would be the other side of the track (the side away from the building), but I don't remember" (R. 84).

When Petitioner got back to the cars he found the tag on the side of the second car (the one at the second loading platform), on the side where he was then standing, "It would probably be on the inside" (R. 36). The tag was most likely to be on the inside of the track since the platform was on the east side (R. 90). In order to pass a hand signal to the men on the engine he had to cross to the west side of the track and go some distance west (R. 88). When the signal was given the man, "They proceeded with the engine on to the Casein Spur switch and backed in to the first car and coupled into it and into the second car and coupled it on there" (R. 36). Petitioner was working on the east side of the track and between the track and building when the couplings were made by him or Brown, and after the couplings were completed he or Brown signaled the engineer to proceed ahead off the spur while he was between the track and building (R. 89-90). Petitioner remained in that position while the engine pulled the two cars past him and proceeded "toward the east" (R. 91).

During this period of time Petitioner had every opportunity to see and must have seen the curvature of the track and its obvious location with respect to the west walls of the Casein Building. He must also have observed the two loading platforms where the cars were initially located at the time he looked to see which car was to be removed. The difference in the construction between the first and second platform, as shown upon Exhibit 1 (R.

26A), made it apparent that cars came much closer to the wall of the building at that platform and to the north of it than at the second platform, located on straight track. The car later involved in the accident was initially at the first platform and then was moved back and later forward while Petitioner was on the east side of the track in the immediate vicinity of the loading platforms. The physical dimensions of the car were obvious and the clearance between the side of the car and the building as it rounded the curve was also open and apparent and is clearly shown by Exhibits 41 and 42 (R. 328A and B). Petitioner admitted that he had an unobstructed view of the track and building after the cars pulled past him and when he walked to the north to cut off the second car, saying:

"969 Q. And when you walked out after the movement started, and the cars remained ahead of you all the time, there was nothing to prevent you then from having a full view of all of the Casein Spur track, at least from the point where the second loading platform is located, until it joins on to the Myrtle Street track, was there?

A. No.

970 Q. Now when that movement started out, the engine and the two cars, you knew at that time that it would be necessary to bring the first car behind the engine back in and re-spot it at the first door, didn't you?

A. Yes." (R. 92)

After Petitioner uncoupled the second car while on the Myrtle Street track he observed, while standing in the position which he marked "XW" on the plat (R. 26A), that the crew was ready to re-spot the first car and stated

that he walked toward the building following the course marked with a dotted line to a point "XY", where he crossed to the east side of the track at the place where the building jutted out toward the track (R. 38, 96). It is apparent from the plat (R. 26A) and also from Exhibit 44 (R. 332B) that the "Impaired Clearance" sign was readily observable from the position designated "XW" and would continue to remain in his range of vision while he walked some 30 feet toward the building and until he reached a point almost opposite the sign. The standard and back of the sign (not bearing a legend) would continue to be visible thereafter and while he was approaching and crossing the track. At that time he necessarily looked in its direction because he observed the car approaching and about 50 feet distant (R. 97).

Petitioner's testimony on direct examination, and quoted on page 9 of the Petition, respecting his claimed lack of knowledge of the clearance and curvature of the Casein Spur track was largely disproven by Petitioner himself in the course of his further testimony, as previously shown, and will be further demonstrated. Referring to his conduct and observations made and his ability to see what was open and apparent at the time he crossed the track and his further movements just preceding the accident:

"162 Q. Now then, after you crossed the Casein Spur track for the purpose of being in position to either take or give signals, do you recall whether or not you moved for some distance either to the south or north?

A. I don't recall. I moved a few feet in there, yes, toward the south.

163 Q. Why did you do that?

A. *To get a better view.*

164 Q. To get a better view of what?

A. To see if I could get a better view of Brown. *It is on a curve.*" (R. 40)

"1030 Q. Your recollection of the place where you crossed the track is that it was at the point where the building juts out about twelve inches closer to the track?

A. Yes.

1031 Q. That is the place that you selected to cross the track and to go between the track and the building?

A. That is the place I walked across.

1032 Q. Well, the choice was yours, wasn't it?

A. Yes, sir.

1033 Q. It was your selection?

A. Yes.

1034 Q. And at the time you crossed the track at that point, where was the car, the end of the car that was coming in on to the spur?

A. Well, it would be some place in between the pavement and where I was standing.

1035 Q. Well, it was fifty feet away from you, wasn't it?

A. Well, I imagine. I don't know what the distance was.

1036 Q. Well, without knowing what the distance was, don't you remember that at that time the end of

the car nearest you was out on the Myrtle Street paving?

A. Well, I couldn't say where it was, exactly.

1037 Q. Weren't you paying any attention to where the car was?

A. Yes, sir, sure.

1038 Q. Where was it?

A. It was coming back in there to be spotted.

1039 Q. How close was it to you?

A. I don't know.

1040 Q. You saw it, didn't you?

A. I was there.

1041 Q. Why can't you tell me how far away it was from you?

A. Well, how could I tell how far it was.

1042 Q. You had plenty of time to cross the track as far as the movement was concerned, didn't you?

A. Yes, I had plenty of time." (R. 96-97)

"1050 Q. After you crossed the track did you ever see Brown again?

A. No." (R. 98)

"1057 Q. After you crossed the track you didn't receive any signal from Brown?

A. No.

1058 Q. And after you crossed the track you didn't pass any signals of any kind to the engineer?

A. Not that I know of.

1059 Q. How far did you walk between the track and the building, Mr. Ellis, before you came to a stop?

A. I think it was in the neighborhood of ten feet.

1060 Q. From the point where you crossed the track where the building juts out, down to the point where you got hurt?

A. Yes.

1061 Q. When you saw the car backing in as you were approaching and crossing the track, it was moving real slow, wasn't it

A. Yes.

1062 Q. Somewhere between a mile and two miles an hour?

A. Oh, I would imagine it would be two miles or better. Three miles is as fast as a man walks slowly.

1063 Q. Well, what is your recollection as to how fast it was proceeding in on that track?

A. Well, we will say two miles.

1064 Q. It might have been slower than that?

A. Yes, it could have been slower.

1065 Q. And the next time you saw the car from the time you saw it when it was a distance of about fifty feet away from you,—the next time you saw it was when the south end of the car proceeded past you, wasn't it?

A. Yes, sir.

1066 Q. And that was while you were standing still?

A. Yes, sir.

1067 Q. And it was still moving about two miles an hour, or maybe less?

A. As far as I know." (R. 98, 99)

"1079 Q. There was nothing to prevent you from seeing just what the curvature was, was there?

A. No.

1080 Q. And of course the distance between the building and the nearest rail was at all times open and apparent to you from the time you started across the track, while you were crossing the track and while you were walking between the track and the building?

A. Yes." (R. 100, 101)

This testimony of Petitioner quoted above shows beyond any question that he did have some "knowledge" of the clearance and curvature of the Casein Spur track. His own testimony also affirmatively discloses that he knew, as the result of his previous railroad experience and prior to being injured, that a railroad car would overhang the rail the most at its center on the inside of a curve (R. 100, Q. 1076), this apparently being a matter of common knowledge to switchmen "working on the ground" (R. 209, Q. 2397). That Petitioner also knew that he was standing on the inside of the curve at its apex is also affirmatively shown by his own testimony quoted on page 85 of Petitioner's brief. The comments of counsel following this quoted testimony are not only unfair to this Court and to the Supreme Court of Nebraska, but are also without substantial support in the record. It was not "on the basis of the quoted testimony," as stated, that the State Supreme Court "adopted an inference." The only statement contained in either opinion which affords any

possible semblance of justification for this charge made by counsel is the statement previously quoted on page 5 herein (R. 384), and particularly that portion reading:

> "* * * the inside of the curve which was directly in front of him and that the narrow distance between the building and the car * * * was open and apparent to him at all times."

The basis for this statement is obviously not limited to the "quoted testimony," as asserted by counsel, but finds support in the other admissions made by Petitioner, part of which we have previously set forth, and the rest of which will be directed to this Court's attention in connection with Petitioner's other testimony, which established his negligence as a matter of law to be the sole proximate cause of his injuries.

Petitioner at no time testified that the testimony given in his deposition, which is quoted on page 85 of Petitioner's brief, was in any way or in any degree erroneous, nor did *he testify*, as now argued by his counsel, that this testimony, as distinguished from other testimony which concerned other matters, was induced by any observation made after the accident and before his deposition was taken.

C. Petitioner Was Not Required to Work Where the Danger Existed and There Was No Necessity For His Presence There

The plat (R. 26A) shows that no obstructions existed along the west side of the Casein Spur track at any point which affected adequate clearance on that side of the track. There was no evidence that any temporary condition existed on the west side of the track which would interfere

in any way with the members of the crew working on that side in perfect safety to all concerned. There was no evidence from Petitioner or any other witness that he was "required" to work upon the side next to the building where it was obvious that close clearance existed, and certainly no evidence that he was "required" or even justified in assuming the position he occupied when the accident occurred. The most that can be said which finds support in the evidence is that Petitioner crossed the track to be on the engineer's side, as he says, to receive signals from Brown, who was "supposed" to be at the first loading platform to relay those signals to the engineer (R. 39, 40). That it was customary under ordinary conditions to give signals from the engineer's side of a track and such custom also prevailed on the Casein Spur track, but Petitioner, who repeatedly denied that he had ever been on or along that spur prior to the day of the accident, does not claim to have had knowledge or to have relied upon any custom as respects the manner of working on that particular track. This evidence might support an inference of "permission" if the presence of the warning sign is disregarded, but it fails to afford any reasonable basis for inferring necessity or requirement and other undisputed testimony of Petitioner and his own witnesses does not permit an inference of necessity or requirement.

Petitioner admitted that signals to control the movement incident to re-spotting the car could have been given from the fireman's side (West side) of the track merely by notifying the engine crew that they would be so given, as he had previously done and knew that to be the proper practice whenever it would be dangerous to assume a position on the engineer's side of any track where he might have occasion to work (R. 102-103). Petitioner had also

testified that it was his "duty to be in a position to be able to give or take a signal from Mr. Brown" (R. 40). When he crossed to the east side of the track (for that purpose) he discovered immediately that he was not in a position either to give or to receive from Brown any signal, because the construction of the building prevented him from seeing Brown, and Petitioner received no signal (R. 98). Brown likewise could not see Petitioner, although Brown was at the first loading platform where he was "supposed" to be (R. 206). At the time Petitioner crossed to the east side of the track the car coming in on the spur was about 50 feet away, moving at a speed of two miles per hour or less (R. 97-99). Petitioner therefore had ample opportunity to observe that he was not in a position to receive or transmit signals to Brown and to recross the track to the west side ahead of the car, where he would have been in a position to see Brown and discharge the duty he claimed to have. Instead he walked about 9 feet south between the track and the building and came to a stop short of a position where he could see Brown (R. 40, 98). Thereafter the front end of the car passed him, still traveling at the same low speed, but he made no effort to see where the side of the car was with reference to the wall of the building he was against (R. 99, 100). Petitioner's witness, Buzard, testified without contradiction that it was not necessary for signals to be relayed or for Petitioner to be between the track and the building for the purpose of spotting the car (R. 181). It is true that if Petitioner had moved out of the range of vision of the engineer the latter would have brought the movement to a stop immediately (R. 191). Therefore if Petitioner had paid the slightest attention to the car even after the front end had reached and passed him and walked along beside it, as he admittedly could have done with absolute

safety (R. 99), he could easily have avoided the injury. If by so doing the movement would have come to a stop, that would also have made it certain that the accident would never have occurred. The few seconds delay that might have resulted from stopping the car and until Petitioner could take a safe position on the west side of the track or even on the east side away from the apex of the curve where he could contact either the fireman or engineer by signal would have been of no consequence. Surely Petitioner and his counsel do not expect this Court to justify Petitioner's conduct upon the ground that the movement should not have been stopped—even temporarily.

Petitioner's witness, Brown, also testified that it was not necessary in re-spotting the car to relay signals to the engineer through Petitioner (R. 206-207, Q. 2375). Brown had gone to the first platform for the purpose of giving such signals to "the engineer or fireman" (R. 206). He was on the east side of the track because he saw Petitioner on the engineer's side while Petitioner was standing on Myrtle Street as Brown, after lining the switch, walked in on the spur and received no instructions from Petitioner to work on the west side (R. 204-205, 207). There was only one car coupled to the tender of the engine and by the time it would be necessary to give signals to spot the car the engine would be sufficiently around the curve so the engineer would be able to see Brown (R. 207). No other evidence was adduced which would show or tend to show that Petitioner was "required" or even authorized to work between the track and building at the place he was injured under the conditions existing. If, as counsel for Petitioner state (p. 54),

> "* * * it was important and necessary that petitioner, the engineer, and switch helper Brown coor-

> dinate their work and efforts so that the work in hand hight be efficiently and safely carried out.",

a statement not warranted by the evidence, it is certain that Petitioner assumed a position which absolutely precluded any such coordinated action.

It was in recognition of the undisputed evidence stated above that the Nebraska Supreme Court said:

> "The plaintiff in performing his duties was not necessarily occupying the place or position where he was at the time of the injury. It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined." (R. 386)

Counsel for Petitioner, at pages 68 and 95 of Petitioner's brief, quote only the last two sentences of the three quoted above. This apparently was done intentionally in a way calculated to lend apparent support to the unjustified charge that the State Court "* * * made a complete turn about in its second opinion * * *." It is obvious that all three of these sentences must be considered together as obviously intended and that the word "there" used in the second sentence and "It" used in the last refer to the "place or position where he was at the time of the injury," as stated in the first sentence. Unfairness of this kind, both to this Court and the Nebraska Court is, in our opinion, a tacit concession of the lack of merit in this Petition.

Further proof of the same disposition to unfairness is found in the argument made on pages 77 and 78 of Petitioner's brief concerning the correction made in the supplemental opinion (R. 377-383) of an obvious error

through the inadvertant omission of the qualifying words which were added a few days later at the Court's own direction. The Record (R. 386) does not justify the insinuations made and any lawyer who is familiar with the various reporting services, which provide rapid distribution of the opinions of this Court and other Courts, knows that similar corrections to supply inadvertent omission or to correct obvious error are frequently made by any Court. Petitioner does not contend that any other change was made in the supplemental opinion after it was first published and the same qualification was originally made in several other places in the supplemental opinion (R. 384-386) as well as in the first opinion (R. 351-352), which definitely shows that the Nebraska Supreme Court was not confused as to the facts, as further contended by Petitioner (p. 94).

Apparently in further effort to persuade this Court that something unclean or dishonest should be inferred from the fact that this minor correction was made, counsel for Petitioner, at the top of page 78 of Petitioner's brief, erroneously state:

> "The engineer, in fact, had testified that until after Ellis was injured he had never * * * known of employees working on the other side of the track, * * *."

The apparent support for this statement is the fragmentary portion of the testimony of this witness quoted first on page 18 of the Petition and repeated again on page 94 of the brief. To achieve the desired end the Petition and brief studiously avoid quotation or mention of the questions and answers of this witness immediately following the first answer quoted. These are:

"2258 Q. So that according to your observations Mr. Ellis was working on the proper, at least the customary side?

A. Well, it is optional. Whoever is on the ground, they can work on either side, as far as that goes. It does not make any difference which side they work on.

2259 Q. But in going inside on the Casein Spur you never saw any one work on any other side in doing the work he did?

A. Yes, that is, speaking for myself. All of the other fellow say they work on both sides. Oh, previous to the accident I can't recall of any time working on the fireman's side." (R. 196)

Another misstatement of the Record concerning the testimony of this witness, which was offered by Petitioner, appears on page 20 of the Petition, where it is said:

"* * * he could not recall any other track that was as close to a building or fixed structure as was the Casein Spur."

We again quote from the Record:

"2058 Q. Well, do you recall of any track in or about the Argo yards that is curved and located as close to a building as the Casein Spur is located to the Casein Building?

A. Yes, several of them.

2059 Q. And where are those?

A. Well, there is one at the local yard at our freight depot and there is one on King County lead, and one of our industries, that is, the Federal Pipe, and I believe now that Pacific Huts has got one that is on a curve that is practically as close, and I know at Boeings

they have them and all our stock yards." (R. 177)

Considering the testimony which preceded this, along with the testimony quoted above, it is quite apparent that this witness was for a time confused by the form of the questions asked and when inquiry concerning the same subject was made in more understandable form he encountered no difficulty in making direct, frank and responsive answers. Similar testimony to that quoted above was given by Mr. Estes, who added that the amount of clearance on such industrial tracks is dependent, in part, on the requirements of the particular industry served (R. 233).

Petitioner had been engaged in working on the tracks serving the Boeing plant since he was promoted to engine foreman (R. 63) and had just come from there the day he was injured (R. 33).

In the light of the undisputed evidence, Petitioner's contention that Respondent negligently failed to provide a reasonably safe place to work cannot be upheld. The evidence conclusively establishes that the place (the Casein Spur track) was a reasonably safe place to work. There was only a short space along the side of the building on the inside of the apex of the curve where clearance was impaired. Proper warning of "Impaired Clearance" was given by the maintenance of the sign. Even in its absence, this danger would be obvious to an employee making any reasonable use of his own faculties, and Respondent had the right to expect and assume that its employees, and particularly Petitioner, would make such use. It was neither necessary nor proper for Petitioner to cross to the inside of the curved track where it was obvious that the building jutted out closer to the track and which neces-

sarily reduced the clearance. His decision to remain between the track and the building after he knew that he was precluded from discharging the duty he claimed to have undertaken was wholly inexcusable. It was his failure to exercise any care thereafter for his own safety which resulted in his injury, and not because of a negligent failure on Respondent's part to provide a reasonably safe place for him to work. The Respondent's duty in this respect has never required the employer to make or keep all places where his employees may go but are not required or reasonably expected to go to perform the work reasonably safe. Such a rule would, in its practical operation, render the employer an insurer of the safety of whatever part of his or a third person's premises an employee might choose to use in the performance of his duties, even though it be obviously unnecessary and dangerous; as in this case. Furthermore, negligence in this situation cannot be predicated merely upon the short space necessarily existing between an industry track and the side of a building where loading facilities are maintained.

Tuttle v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 194-195.

Reese v. Philadelphia & Reading Co., 239 U. S. 463, 465.

Toledo, St. L. & W. R. R. Co. v. Allen, 276 U. S. 165, 170.

Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 10-11.

Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403.

Davis v. Hand (8th Cir.), 290 Fed. 73, 78.

Haring v. Great Northern Ry. Co., 137 Wis. 367, 119 N. W. 325, 328.

Canadian Northern Ry. Co. v. Walker (8th Cir.), 172 Fed. 346, 350.

Baltimore & O. R. Co. v. Newell (3rd Cir.), 196 Fed. 866, 869.

Hogan v. New York Cent. & H. R. R. Co. (2nd Cir.), 223 Fed. 890, 893.

Hogan v. New York Cent. & H. R. R. Co., 209 N. Y. 20, 102 N. E. 555.

McCann v. M. & St. L. R. Co., 159 Minn. 70, 198 N. W. 300, 301.

Stone v. Chicago & N. W. Ry. Co., 176 Minn. 104, 222 N. W. 641, 642.

II.

There Is No Substantial Evidence of a Negligent Failure to Warn Petitioner of the Close Clearance Existing at the Point of Accident.

Petitioner at the time this accident occurred was the foreman of the switching crew (R. 31). As such, he had supervision over the helper switchmen, as well as the engineer and fireman. Each of those persons was subject to his orders and the movements made were made under his directions (R. 73). The engineer, Buzard, and the fieldman, Brown, had each worked with Petitioner on previous occasions (R. 170, 203-204). Field, the pin-puller, who remained on the Myrtle Street track near the switch (R. 314), had previously seen Petitioner around the yards, knew that he had been a foreman for some time (R. 321). Each of these persons, therefore, knew that Petitioner was an experienced switchman. They also knew that the sign bearing the legend "Impaired Clearance" was present and had been continuously so located ever since each of them had been assigned to work in that immediate vicinity (Buzard, R. 185; Brown, R. 217-218; Field, R. 318-319). The engineer and Mr. Brown also knew that Petitioner had gone in along the spur track just a few minutes before

when the check was made to see which car was to be taken away and when the engine was ordered in, the couplings made and the two cars taken out. Field undoubtedly had the same knowledge, although this does not appear one way or the other in the testimony. Each of these witnesses had observed Petitioner on the east side of the track near the corner of the building where the sign was located only a minute or so before the accident occurred (Brown, R. 205, 207; Buzard, R. 191, 201-202; Field, R. 315). Petitioner admitted in the statement given to Mr. Estes, over his own signature (R. 117), that he had necessarily been in the same position (Ex. 10, R. 333). As previously stated, the testimony of Buzard and Brown was by deposition taken and offered in evidence by Petitioner. Each of these persons was therefore justified in believing that Petitioner had been advised of impaired clearance, not only by the legend on the sign, but by the open physical conditions obvious to one on the grounds between the track and building at the point of accident. This is particularly true since Petitioner neither testified nor now claims that he advised any member of his crew of his claimed unfamiliarity with the conditions there existing or that he ever requested or sought the advice of anyone as to the proper, safe or customary methods previously employed on that track. Under these conditions it would have been presumptuous impertinence on the part of his subordinates to have suggested to Petitioner the way in which he should conduct the work in his charge when none of them knew that he would place himself in a situation of peril and thereafter fail to exercise any precaution for his own safety.

It is apparently Petitioner's contention that some specific and express warning of the impaired clearance exist-

ing at the point of accident should have been given him by one of his superiors before or at least at the time that he was given the instructions to pick up the car at the Casein plant (pp. 84-85). This contention is likewise made in utter disregard of the undisputed evidence which conclusively establishes that Respondent had provided a constant and continuing warning by its erection and maintenance of the sign, and also that the curvature and location of the track with respect to the Casein Building was open and apparent.

The duty to exercise ordinary care with respect to warning applies only to hidden or latent dangers known to one owing the duty and which are not readily discoverable by the exercise of ordinary care and diligence on the part of the one to whom the duty may otherwise be owing. In this situation, as in all others where ordinary care is the measure of the duty, its discharge is justifiably accomplished upon the assumption that a mature employee in full possession of his faculties will, in the absence of notice to the contrary, exercise ordinary care for his own safety.

Missouri Pacific R. Co. v. Aeby, 275 U. S. 426, 430.

National Biscuit Co. v. Nolan (8th Cir.), 138 Fed. 6, 12.

Grand-Morgan Theatre Co. v. Kearney (8th Cir.), 40 Fed. (2) 235, 237.

New York Central R. Co. v. Boulden (7th Cir.), 63 Fed. (2) 917, 919.

State of North Dakota v. Great Northern Ry. Co. (8th (Cir.), 155 Fed. (2) 1005, 1008.

Certainly those superior in position to Petitioner would not be required to anticipate that he would so regu-

late his own movements or observations in connection with the work to be done at the Casein plant that he would fail to see or heed the warning sign or obvious lack of clearance on the inside of the curve or that he would carelessly assume a position of obvious peril and make no effort to protect himself from a danger readily discoverable and permit the center of a car passing him at a slow rate of speed to squeeze him against the building in broad daylight. Such anticipation would require clairvoyant powers far beyond the ability of the reasonably prudent person similarly situated, which is the legal standard. "Ordinary care has reference to the probabilities of danger rather than the possibilities of peril." *State of North Dakota v. Great Northern Ry. Co.*, 155 Fed. (2) 1005, 1008. "Bare possibility is not sufficient." *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483.

Petitioner argues that the testimony of Brown. quoted in the Petition on pages 31-32, which relates to warning given by members of the crew to known newcomers in consequence of Petitioner's injury, "persuasively shows that defendant had knowledge of the danger * * *." Of course, defendant, following this accident, knew that Petitioner had been injured and the manner in which it occurred. It certainly does not follow from this, however, that it ever occurred to any one, before Petitioner was injured, that any warning other than that then provided should be given. The "persuasive" quality of that testimony as urged by counsel is the same as the kind of persuasion which would be required on the part of an insurance salesman who would offer to sell retroactive policies of windstorm insurance to those who had owned property in the tornado's path.

III.

There Is No Substantial Evidence of Negligence on the Part of the Engineer and the Undisputed Evidence Affirmatively Establishes the Absence of Negligence on His Part.

In referring to the evidence bearing directly on this matter and more particularly the testimony of the engineer (Buzard), counsel for Petitioner have again presented a distorted picture. This has been accomplished in this instance as in the others by omitting the mention of much of his testimony, by making statements directly contrary to or unsupported by the evidence when considered as a whole, and by drawing unjustified inferences which do violence to the undisputed testimony of this witness which, in many important particulars, is corroborated by the testimony of all other witnesses and by undisputed physical facts. Respondent also invites this Court to review and consider all of the testimony given by the engineer (R. 169-203) along with the other undisputed evidence. We will not repeat his testimony to the extent that counsel for Petitioner have fairly or accurately set forth or commented upon it, nor shall we repeat at this point his testimony which we have previously referred to herein.

Though Buzard had been engaged from time to time over a period of 18 years as a fireman or engineer (the latter for 3 years) upon locomotives handling cars on this track previous to the accident, he had always remained in the locomotive cab on each previous occasion and had never been on the ground in the vicinity of this track before the accident occurred (R. 169, 183; Qs. 2128-2129; R. 193, Q. 2237). Accordingly he did not get back along the track a sufficient distance to observe the physical characteristics of the loading platforms along the west wall and thought

that there were only two platforms (R. 172). From his position in the cab at the rear of the engine it had always previously appeared that there was ample space between the cab and the wall of the Casein building, because the cab did not overhang the inside rail while rounding the curve to the same extent as did the cars or engines at their center (R. 183-184, Qs. 2128-2134). Except for the "Impaired Clearance" sign he would not have known that there was less than standard clearance between the track and building (R. 185, Q. 2142; R. 190, Q. 2204; R. 194, Qs. 2239-2242). The sign had not meant a great deal to him because he had no previous occasion to be outside the cab as did switchmen (R. 185, Q. 2143). He last saw the sign two or three days before his deposition was taken. It did not appear new to him then and looked like all such signs (R. 185-186). Just before the accident occurred he was backing in on the spur at a speed of *one* to *two* miles per hour and the car was coupled to the locomotive tender (R. 188, 195, 180, 189). He was therefore from 30 to 35 feet from the rear of the tender (R. 189, Q. 2189). The engine was headed east at the time the movement started and he was on the south side of the engine (R. 180, Qs. 2089-2091). He saw Petitioner near the corner of the Casein building as the movement got under way and watched Petitioner continuously thereafter for signals (R. 181, Qs. 2095-2101; R. 182, Qs. 2105-2108). Before the occurrence of this accident nothing had ever occurred in his experience to cause him to realize that the center of a car would come so close to the side of this building while rounding the curve (R. 189-190, Qs. 2192-2202).

Petitioner argues (pp. 21, 92) that the engineer, if alert and attentive, must have seen the side of the car converging towards Petitioner and must, or at least should

have seen that Petitioner was in a position of peril. This argument is made not only in the face of the unimpeached testimony of this witness to the contrary but also in utter disregard of the physical facts, as shall be shown. The point of the accident is shown on Exhibit 1 (R. 26A) to be a little less than 10 feet south of the point where the building juts out about 12 inches closer to the track. From this point the wall of the building extends for a distance of approximately 28 feet in a northeasterly direction to the northwest corner of the building. At the time the accident occurred, at least half of the car was to the northeast of Petitioner. The north end of the car, therefore, was a distance of approximately 15 feet to the northeast of the jutting extension. The tender of the locomotive being 30 to 35 feet in length also intervened, which placed the engineer a distance of some 50 feet from the jutted extension, making allowance for space between the ends of the engine, tender and car. At the time of the accident, therefore, the engineer was in the cab approximately 60 feet northeast of Petitioner and in a position just above the south edge of the Myrtle Street pavement. This is in effect his undisputed testimony (R. 202, Qs. 2326-2332). The engine was, therefore, still headed in a general easterly direction and when he moved a short distance "ahead" to free Petitioner he moved to the "east" (R. 197, Qs. 2273-2275). The photograph (Ex. 43, R. 332A) was taken with the camera located at the south edge of the Myrtle Street pavement and 18 inches to the east or left of the inside rail. Mr. Estes, shown in the picture, was then standing with his back against the indentations in the side of the building in the position which Petitioner was standing at the time of the accident (R. 330-331). Except for the fact that the camera was four or five feet above the ground and the eye level of the engineer would be con-

siderably higher (which, however, is immaterial), this picture shows substantially the view that the engineer had of Petitioner at and immediately previous to the time of the accident. The car shown in this photograph is a different car then located at the first platform (R. 331). This is the only photograph contained in the Record and taken from a position which would reflect the view of the engineer. From this photograph, the plat, and his testimony it indisputably appears that he could not see the side of the car "creep up" on the wall of the building, because the building was not on a uniform curve, but "is chipped off into diagonals and I was looking off across this first thirty feet diagonal, * * *" (R. 192, Q. 2220). Continuing, he testified:

"2221 Q. Did you see Mr. Ellis get caught and crushed between the side of the car and the building?

A. No, I did not see that at all. All I saw was, as I say, I saw his right foot twisted on the ground and then I stopped.

2222 Q. Well, you could see his body, too, could you not?

A. No, in order to see just exactly what he was up against I had to get back inside of the cab and look out the back window and I see he was pinched after it was all over with. He was standing partially,—I could see his back and of course his left leg and left side was away from me and I could not see that." (R. 192)

Further undisputed proof showing how the construction of the building interfered with the view which the engineer had is found in testimony of Brown that from his position immediately south of Petitioner (after the accident and when he had gone to investigate the reason

for the stopping of the movement) he could *not* see the engineer and was therefore required to call out instructions (R. 212-213, Qs. 2429-2431). This testimony is misstated on page 17 of the Petition so that the opposite impression might be obtained. In view of counsel's unjustified assertions that the engineer could see the wall at Petitioner's back or any part of the wall beyond the point where the building jutted out (p. 25), we quote from the record:

"2234 Q. You could see the side of the building?

A. Where he was standing?

2235 Q. You could see the wall of the building?

A. Where he was standing?

2236 Q. Yes.

A. No, no, I could not because I was around this little jog in the building and I could not see that part of the building at all." (R. 193)

The first indication of danger to Petitioner which the engineer could or did see was when he saw Petitioner's "right foot twisted on the ground and I stopped right there * * *" (R. 191, Q. 2211). The evidence is undisputed that the engineer acted with such extraordinary care, vigilance and skill that he stopped the movement, as conceded by Petitioner, "almost instantly" (p. 79) and within a distance of 12 or 14 inches (R. 195) from the time the car started to squeeze Petitioner (R. 214-215, Qs. 2447-2452).

Respondent submits that in view of this positive, undisputed, unimpeached and corroborated testimony no inference can be reasonably adduced by any fair-minded

person to the effect that the engineer knew or should have known that the Petitioner was in a position of peril or oblivious to his own situation prior to the time that his foot was observed to be turning. Such inferences as counsel for Petitioner now assert cannot exist in the face of such affirmative evidence that the facts sought to be inferred did not, in fact, exist. *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 340, and authorities cited.

The fact that Petitioner himself, notwithstanding the natural inclination of all persons to attribute misfortune to the conduct of others, had no criticism to make and attached no blame or fault to the engineer for a period of almost a year following the date of the accident is highly significant (R. 103, Qs. 1109-1110). That Petitioner changed his mind and was more critical of the engineer at the time of trial (two months later) is not unusual, but it was wholly unjustified (R. 103, Qs. 1107-1108). Petitioner had always known that the engineer was watching him and had so testified himself (R. 39, Q. 154). He must also have known long before his or the engineer's depositions were taken that the movement was stopped almost instantly and that he owed his life to the care, diligence and skill which that entailed, because he had always known that the car was moving at a speed of two miles per hour or less (R. 99, Qs. 1062-1067), as well as his position at the time of the accident (R. 57) and immediately following (R. 41-42).

IV.

Petitioner's Negligence Is Established by His Own Testimony to Be the Sole Proximate Cause of the Accident.

In discussing the evidence concerning this matter, we cannot entirely avoid making some repetition. The portions of the evidence previously directed to the attention

of this Court will, however, be summarized as briefly as possible, such as Petitioner's own testimony that he had on at least three or four previous occasions been a member of the crew which handled cars to the Casein plant in the summer or fall preceding the accident. That on the day the accident occurred, he had been between the track and the building in the vicinity of the first two loading platforms on at least two separate occasions before he was injured. That no artificial light was required or used and hand signals were employed. There were no obstructions to his view of the track as the two cars were taken off the spur and that he did observe the curvature of the track at that time and shortly before. That he knew that the first car out was to be re-spotted at the first loading platform. The fact that as he crossed to the east side just after the movement got under way he had ample time in view of the slow rate of speed of the movement and the distance intervening. His discovery that he could not see Brown, and his walking south for a distance of nine feet between the track and building and then stopping at that point. His knowledge, as the result of his previous experience, that signals could and should be given from the fireman's side of the track if it would be dangerous to pass them from the engineer's side and his knowledge that it was characteristic of all cars to overhang the inside rail the most at their center when at the apex of a curve. That he was standing at the place where the greatest likelihood of that occurrence existed.

Petitioner did not trip or stumble over any object and "got hurt * * * only because (he) got into a place that was simply too close for (him)" (R. 103, Qs. 1105-1107). After observing the car proceeding towards him when at a distance of about 50 feet and knowing it would

have to be moved past the point he would be occupying, he had turned his back upon it and made no further observation of the car until the south end moved past him, which was after he had come to a stop (R. 99, Qs. 1065-1066). From his position nothing could or did obstruct his view, both of the side of the car and the side of that portion of the wall of the building he had his back against (Ex. 3, R. 92A). He admittedly made no "attempt at all to see where the car was coming, or the distance between the inside of the car and the side of the building * * *." (R. 100, Qs. 1074-1075.) He then testified:

"1079 Q. There was nothing to prevent you from seeing just what the curvature was, was there?

A. No.

1080 Q. And of course the distance between the building and the nearest rail was at all times open and apparent to you from the time you started across the track, while you were crossing the track and while you were walking between the track and the building?

A. Yes.

1081 Q. You didn't take any precautions for your own safety at all after you crossed to the east side of the track, did you, Mr. Ellis?

A. There wasn't any precaution to take.

1082 Q. Well, you didn't take any precaution or make any observation for your own safety at all?

A. Assuming it was a safe place to work, there wasn't any reason for taking any precaution.

1083 Q. Did you take any?

A. No.

1084 Q. Did you make any observation, make use of your own eyes, for the purpose of trying to protect yourself and save yourself from harm?

A. What do you mean by that?

1085 Q. Well, did you make any observation in an effort to try to save yourself from injury?

A. What kind of an injury?

1086 Q. (Read by reporter) Did you make any observation in an effort to try to save yourself from injury?

A. No." (R. 100-101)

His counsel, on page 55 of Petitioner's brief, laboriously argue that it would require a knowledge of trigonometry and the possession of complicated measuring instruments on Petitioner's part to have been "able to figure out what would happen if he remained in the position he was in * * *." Petitioner was possessed with the only instruments required to avoid this accident—his eyes—and if he had made any effort to use them the accident could and would have been easily prevented. He admitted that even as the end of the car reached him he could have walked along the side of the car near the front end all the way to the first loading platform without being injured (R. 99, Qs. 1069-1070). Had he walked only a distance of a few feet it would also have avoided the accident. The injury could also have been readily avoided if he had given the slightest signal of danger to the engineer who had the movement under perfect control. But Petitioner admitted that he gave no signal to the engineer at any time after he crossed to the engineer's side of the track (R. 98, Q. 1058).

His attorneys at the trial, before the State Supreme Court and now before this Court make a valiant effort to justify or at least excuse Petitioner's utter lack of care for his own safety by arguing from Petitioner's self-serving testimony, which first appeared in his redirect examination (R. 134), that he was engrossed in his work. The facts, however, indisputably show that this accident occurred in the course of a routine unhurried switching movement which involved the re-spotting of an ordinary car to be handled in the "normal way." In view of the admitted speed of the movement the accident did not occur until after some 28 seconds had elapsed after Petitioner crossed the track, and some 8 seconds or more after Petitioner had abandoned his idea of making contact with Brown. This upon the assumption that he crossed the track at "XY", that about half of the car had proceeded past him before he was caught and that the car was traveling at a speed of 3 feet per second. During that time Petitioner had adequate opportunity and certainly had the duty to make some observation for his own protection and if he had made any, this accident would have been prevented. If, therefore, the danger of being caught can be said to have been "hidden" from Petitioner, it was simply because he closed his eyes to that danger.

Authorities Relied Upon by the Petitioner

We shall not burden this Court with a detailed discussion of these cases and the facts involved which distinguish them from this case. To the extent that these cases relate to injuries occasioned through insufficient clearance, they involve employees who were riding upon the top or sides of moving cars or engines where such employees were required to be under the conditions existing in the discharge of their duties. Most of the cases

also involved accidents which occurred at night or under atmospheric or other unusual conditions which precluded the employee from making any observation to protect himself from injury. In none of these cases was there any proof that the employer had maintained a warning sign or that the particular employee concerned had any opportunity to gain knowledge of the dangerous situation. The distinguishing facts in most of these cases are clearly pointed out in the "supplemental opinion" (R. 388-390) and in the original opinion (R. 354-355) of the Nebraska Supreme Court. The same distinctions have previously been made in other cases which more nearly resemble the facts in the present case:

New York, N. H. & H. R. Co. v. Dailey (2nd Cir.), 179 Fed. 289, 291.

Baltimore & O. R. Co. v. Newell (3rd Cir.), 196 Fed. 866, 870.

Hogan v. New York Central & H. R. R. Co. (2nd Cir.), 223 Fed. 890, 895.

McCann v. M. & St. L. R. Co., 159 Minn. 70, 198 N. W. 300, 302.

Davis v. Hand (8th Cir.), 290 Fed. 73, 78.

The case of *Hemmingsen v. Chicago & N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785, discussed in Petitioner's brief (pp. 88-89), was urged upon the Supreme Court of Wisconsin as being controlling at the time that Court was considering the case of *Haring v. Great Northern R. Co.*, 137 Wis. 367, 119 N. W. 325, but the Wisconsin Court did not follow it in the latter case (p. 327) because it was clearly distinguishable upon the facts as there pointed out.

The case of *New York, C. & St. L. R. Co. v. Boulden* (7th Cir.), 63 Fed. (2d) 917, cited on page 90 of Petition-

er's brief, does not, as indicated by the excerpt quoted, involve any question of clearance. The post referred to projected above the surface of the station platform so as to render the surface of the platform defective and the employee was caused to stumble by reason of that defect while alighting from the train.

The case of *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, briefly discussed on pages 57-58 of Petitioner's brief, involved a state of facts which bears no resemblance to the instant case. If Bailey in that case had been the man in charge of the work to be done, as Petitioner was in this case, and had directed that the car be moved on to the bridge when "the car could have been opened or unloaded near the bridge on level ground, * * *" and then assumed a position of obvious danger to do the work, the case would bear more resemblance to the facts in the instant case.

The case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, from which an excerpt is quoted on page 97 of Petitioner's brief, is likewise readily distinguishable. It should first be observed that the Tiller case does not purport to modify or overrule a long line of Federal decisions to the effect that negligence cannot be predicated merely upon insufficient clearance. The case of *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, is not criticized as respects the part of the opinion in that case which relates to the clearance features. The liability in the *Tiller* case, supra, was determined from a finding that the employer was negligent in backing cars on a track adjacent to the track upon which the cars were located which were being inspected by Tiller. The night was dark; Tiller had no knowledge of the cars approaching on the adjacent track and no light was visible from Tiller's position. It also

appears from the later decisions in this case (142 Fed. (2) 718, 323 U. S. 574, 577) that the defendant was engaged in making an unusual switching movement and by its failure to have a light on the tender while so engaged it violated a safety regulation promulgated by the Interstate Commerce Commission, which, if complied with, may have served to warn Tiller of the approaching movement. The case contains no intimation that the amendment of August 11, 1939, to Section 4 of the Federal Employers' Liability Act imposed any additional duty upon the part of the employer as respects the location or spacing of its tracks with reference to each other or to fixed objects adjacent thereto.

The cases of *Owens v. Union Pacific R. Co.*, 319 U. S. 750, and *Tennant v. Peoria & U. P. R. Co.*, 321 U. S. 29, likewise bear no resemblance to the facts in this case aside from the fact that the injuries arose in consequence of switching movements. In the first case it appeared that neither the Circuit Court of Appeals nor this Court gave consideration to the sufficiency of the evidence to establish defendant's negligence, since the Circuit Court of Appeals had decided the case solely upon the ground that the employee had, as a matter of law, assumed the risk of negligence of a fellow servant. In that case there was no certainty, as in this case, that the injured employee knew that the movement was under way or would be started, and the negligence relied upon was the failure to ring the bell in accordance with an operating rule which the Petitioner in that case contended was applicable. After the case was remanded to the Circuit Court of Appeals by this Court, the former gave consideration to the question of defendant's negligence and again reversed the judgment of the trial Court (142 Fed. (2d) 145) and

certiorari was thereafter denied by this Court (323 U. S. 740). In the *Tennant* case, *supra*, negligence was found to exist in the failure to give the employee any warning that the movement would be made as required by one of the employer's operating rules, there being no proof that the employee observed the movement when it started or knew that it was under way. If in that case it had appeared from undisputed evidence, as it does in this, that the employee saw the cars approaching, knew that they would be required to proceed past him, and yet failed to make any use of his own senses to protect himself from injury, and when, if such use had been made, the injury could have been easily avoided, the case would be more in point on the facts, but the opposite result would surely have followed.

A factual situation in no respect comparable to that in the present case is also disclosed by the opinion of this Court in *Lavender v. Kurn, et al.*, —— U. S. ——, 98 L. Ed. 692. It is shown therein that the deceased, Haney, who was employed as a switch tender, was at the time of the accident required to discharge his duties in the vicinity of a certain switch, adjacent to which the ground was uneven, which may have permitted him to have been struck upon the head by an apparently defective mail hook suspended to the side of a car in such manner as to permit it to swing out as much as 12 or 14 inches from the side of the car. The accident occurred in a dark portion of the yards and there was no other proof nor evidence that the deceased knew or was chargeable with knowledge of the propensity of the particular mail hook which was found to have caused the injuries resulting in his death.

CONCLUSION

The undisputed evidence in this case makes it manifest that the decision of the Nebraska Supreme Court is the only decision which can be justified under the existing law. Negligence is made the foundation for the employer's liability under this Act by the Congress. It has not seen fit to change that foundation, nor to make a jury's verdict conclusive that negligence did or did not exist on the part of the employer. The whim or desire of a jury, evidenced by its verdict but without substantial proof to support it, should be no more secure from judicial correction in cases brought under this statute, than under other similar statutes, or the common law, where substantial proof of negligence is also prerequisite to liability. If liability is to be imposed on the employer without regard to fault or negligence, or if the initial determination made by the fact-finding body is to be accorded a sanctity which does not exist in other cases, it is the Congress which should assume that responsibility. This, Congress has not seen fit to do. On the contrary, the retention of dual jurisdiction of the State and Federal Courts in these cases and of negligence as the basis for liability, rather than an administrative determination of the right of compensation for industrial injury, discloses a clear intention on the part of Congress that liability shall exist, only when substantial proof of negligence on the part of the employer has been adduced in the traditional manner. The evidence in this case shows that the only negligence proven was the negligence of Petitioner himself.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 320.—October Term, 1946.

Newton W. Ellis, Petitioner, *v.* Union Pacific Railroad Company.	On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[February 3, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was crushed between a moving railroad car and a building while working for respondent railroad as an engine foreman in charge of a switching crew. Damages for personal injuries were sought in a Nebraska state court under the Federal Employers Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* Judgment was rendered for petitioner on a jury verdict for $10,000, but on appeal the state Supreme Court reversed for insufficiency of evidence to show negligence, and ordered the complaint dismissed. 146 Neb. 397, 19 N. W. 2d 641; — Neb. —, 22 N. W. 2d 305. We granted certiorari because of an apparent conflict between that decision and *Lavender* v. *Kurn*, 327 U. S. 645.

Petitioner's evidence tended to show the following: Petitioner, aged 41, had been in the employ of respondent only one year, and had a total railroad experience of two or three years. Just before sunset on March 15, 1943, he was engaged, along with other members of his crew, in backing an engine and box car around a curve on a spur track where visibility was obstructed by a building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer. Engine foremen frequently stand to the right of the engine, on the

engineer's side of the cab. A switchman was located around the curve, out of sight of the engineer, on a loading platform at which the car was to be "spotted". Petitioner moved between the building and the track in an attempt to be in a central position from which he could receive signals from the switchman and relay them to the engineer. As the car moved past petitioner, it caught and pinned the upper part of his body against the wall of the building, causing serious injuries. The situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was in the one short segment of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it; no effort was made to warn him personally. The nearness of the track to the building created an unsafe place for work. Though the engineer was an experienced railroad worker thoroughly familiar with this particular spur, and though it was his duty to watch petitioner continuously or stop the engine,[1] he failed either to warn petitioner or to stop in time to avert the tragedy. During the operation the engineer could see the right side of petitioner and when he saw petitioner's right foot twisted on the ground, he stopped the train.

Respondent's evidence, on the other hand, tended to establish the following: Petitioner was inconsistent in his statements, and it actually appeared that he had worked around this spur a number of times. The clearance, once adequate, was impaired by a subsequent extension of the

[1] The engineer was required to have some member of the crew in sight at all times when the engine was in motion. At the time of the accident the undisputed testimony indicated that petitioner was the only member of the crew that the engineer could see. The engineer testified that he watched petitioner continuously.

building over which the respondent had no control. Neither the overhang of the car nor the pitch of the curve was unusual. Respondent maintained, near the building and some eight feet above the ground, a prominent, legible sign reading "IMPAIRED CLEARANCE". It was not required or desirable that petitioner stand between the building and the track; he could equally well have performed his functions on the left, or safe, side of the engine. He did not stand where he could see the switchman, and, in fact, it was not necessary for him to relay signals from the switchman since the engineer would be in a position to watch the switchman himself when the car approached the loading platform. The engineer had not worked on the ground and was not aware of the precise hazard; his distance from the petitioner (about 60 feet) and the configuration of the building were such that it was not apparent that the petitioner was in peril. That the engineer was vigilant is somewhat supported by the fact that the train was moving only one or two miles an hour and that he stopped it almost instantly, and within a distance of 12 or 14 inches, when petitioner was pinned between the car and the building.

From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently

petitioner was not furnished a safe place to work.[2] And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U. S. C. § 53.

The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. 45 U. S. C., § 51; *Brady* v. *Southern Ry. Co.*, U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady* v. *Southern Ry. Co., supra; Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350.

The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Lavender* v. *Kurn, supra.* Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra*, p. 652. And where, as here, the case turns on

[2] The duty of the carrier to furnish a safe place to work "is not relieved by the fact that the employee's work in the place in question is fleeting or infrequent." *Bailey* v. *Central Vermont R. Co., supra*, p. 353.

controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68.

We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

Reversed.